89-1003

No. 89-___

In The

Supreme Court of the United States

October Term, 1989

MINERS ADVOCACY COUNCIL, INC.,

Petitioner,

v.

THE STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; DENNIS D. KELSO, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; TRUSTEES FOR ALASKA; and NORTHERN ALASKA ENVIRONMENTAL CENTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

ROBERT JOHN #
WILLIAM R. SATTERBERG, JR. *
LAW OFFICES OF WILLIAM R. SATTERBERG, JR.
709 Fourth Avenue
Fairbanks, Alaska 99701
(907) 452-4454

#Of Counsel
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

(1) May the State of Alaska, through the National Pollution Discharge Elimination System (NPDES) permit certification process, simultaneously insert the same water quality based effluent limitation in several hundred permits, or must the State instead certify NPDES permits and insert water quality based effluent limitations on an individual, case-by-case basis?

(2) Did the State of Alaska waive its right to certify by failing to certify within the 60-day period prescribed by law?

(3) When the United States Environmental Protection Agency (EPA) proposes to modify particular terms of an NPDES permit, may the State of Alaska via the certification process modify different NPDES permit terms which the EPA-proposed permit modification did not even purport to affect?

(4) Did the State of Alaska's certification of the same water quality based effluent limitation for several hundred permits, in disregard of whether such a stringent limitation is necessary to meet State water quality standards in individual cases, effect a taking of property in violation of the Fifth and Fourteenth Amendments?

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OPINION BELOW

The decision of the Alaska Supreme Court is officially reported beginning at 778 P.2d 1126. A copy of the opinion is set forth in Appendix A. (App. 1-31)

JURISDICTION OF THE COURT

The Alaska Supreme Court rendered its decision in this case on July 28, 1989. Petitioner Miners Advocacy Council, Inc. (MAC) filed a timely petition for rehearing (App. 72-88), which was denied in part on September 7, 1989, and in final on September 15, 1989. (App. 68-71)

Since Petitioner claimed and asserted rights under the Constitution and statutes of the United States, this Court has jurisdiction under 28 U.S.C. § 1257(a) to review by writ of certiorari the decision of the Alaska Supreme Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the following constitutional provisions, statutes, and regulations. Since the provisions are lengthy, pursuant to Supreme Court Rule 21.1(f), their pertinent text is set forth in Appendix O (App. 148-65):

The United States Constitution, Amendment V;

The United States Constitution, Amendment XIV, § 1;

33 U.S.C. § 1311(b)(1)(c);

33 U.S.C. § 1341;

33 U.S.C. § 1342(a)-(c);

40 C.F.R. § 121.2(a)(2)-(3) (1985);

40 C.F.R. § 122.62 (1985);

40 C.F.R. § 124.53 (1985);

40 C.F.R. § 124.55(b) (1985).

STATEMENT OF THE CASE

This case concerns the fate and livelihood of several hundred gold miners in Alaska. While their gold mining operations come in all shapes and sizes, the vast majority of these miners are individuals or families, some of whom trace their pursuit of this honest occupation back to the turn of the century. Since the imposition of the stringent conditions at issue in this case, these souls have seen their numbers decrease dramatically. 778 P.2d at 1130 n.7. (App. 6-7)

Placer mining in essence involves the labor of gathering from the earth small particles of that precious metal known as gold. This is accomplished through placing gold-bearing material, called "pay dirt," in a channeled-box known as a "sluice." By then running water through the sluice, the miner, through the force of gravity, gathers the heavier particles, including gold, which collect in the sluice on small underwater barriers known as "riffles."

What goes in must come out, and after the pay dirt is sluiced, it is discharged and captured by the miner, usually in a self-built settling pond. (App. 19) It is post-capture discharge or "effluent" which subjects a miner to the terms of the Clean Water Act.

Both the land and the waters of Alaska are such that they frequently contain naturally high levels of inert, undissolved arsenic. Accordingly, when the earth is washed through the miner's sluice, it is natural for the level in the receiving water to be increased somewhat by the effluent. The same holds true for settleable solids, which are heavier, quickly-settling sediments, and for turbidity, which is not a pollutant but merely a measurement of the cloudiness of the water. (App. 135-36)

Under Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387, any person wishing to discharge pollutants into the waters of the United States must secure an NPDES permit from either EPA or the source State, depending on whether EPA has retained or delegated to the State the permitting authority. 33 U.S.C. § 1342(a)-(c). EPA has not delegated NPDES permitting authority to the State of Alaska. Accordingly, while EPA is thus responsible for issuing NPDES permits in Alaska, before EPA may issue a permit, EPA must provide the State with an opportunity to review the proposed permit to determine whether the permit's terms will meet the State's water quality standards. 33 U.S.C. § 1341(a)-(b). This process is known as "certification." *Id.*

Once a State has been presented with a certification opportunity, the State has three options. The State may deny certification of an NPDES permit, thus precluding EPA from issuing the permit. 33 U.S.C. § 1341(a)(1). In addition, the State may waive certification, either expressly or by failing to render its certification decision within the 60-day period prescribed by law. *Id.*; 40 C.F.R.

§ 124.53(c)(3), (d) (1985).[1] Third, the State may elect to certify the NPDES permit. 33 U.S.C. § 1341(a)(1).

If the State does certify an NPDES permit, the State may specify conditions more stringent than those in the draft permit which are necessary to meet State water quality standards, and must include for each such condition the CWA or State law reference upon which that condition is based. 33 U.S.C. § 1341(a)(2); 40 C.F.R. § 124.53(e)(2). On the other hand, a certifying State is also required to provide a "statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards." 40 C.F.R. § 124.53(e)(3). With the above background in mind, Petitioner will turn to the facts of this case.

In 1984, EPA provided the State of Alaska Department of Environmental Conservation (DEC) with the opportunity to certify 446 NPDES permits to be issued to placer gold miners in Alaska. At the time, DEC expressly waived any right to certify the 446 permits. (App. 53, 55) Accordingly, the 446 placer miners received their NPDES permits which included, *inter alia*, a 0.7ml/l monthly average and 1.5ml/l instantaneous maximum effluent limitation for settleable solids. (App. 81, 91, 95)

Subsequent to the State's waiver of certification and the issuance of the 1984 permits, the United States Court of Appeals rendered its decision in *Trustees for Alaska v. E.P.A.*, 749 F.2d 549 (9th Cir. 1984). This decision held that

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[1] Unless specified otherwise, all future references to the Code of Federal Regulations will refer to the 1985 C.F.R. as in effect during the State's 1985 certification. The relevant 1985 C.F.R. provisions have remained the same through their 1989 codification.

water quality standards, which are goals that must be met for a given body of water, are not themselves proper NPDES permit terms; rather, such water quality standards need to be translated into particular effluent limitations applicable to an individual discharger. *Id.* at 556-57. Thus, the Ninth Circuit held that EPA erred by not requiring an effluent limitation for turbidity and not providing a public hearing on the question of effluent limitations for arsenic and mercury. *Id.* at 557, 561. The court then remanded the case to the EPA to determine what, if any, effluent limitations were necessary to meet the State water quality standards for turbidity, arsenic, and mercury. *Id.*

In response to the Ninth Circuit's decision, EPA on January 31, 1985, gave notice to the 446 permittees that EPA was proposing to modify their 1984 NPDES permits to include effluent limitations for turbidity and arsenic. (App. 101-06) On the same date, EPA notified the State of Alaska DEC of the proposed modifications. EPA also provided DEC with copies of the draft permit with its proposed modifications and informed DEC that the 60-day period for State certification action was thereby commencing and that the "State will be deemed to have waived its right unless that right is exercised within 60 days of receipt of this letter." (App. 89-94) The various notices of the proposed modification nowhere indicated that the settleable solids limitation was subject to modification, and consistent with EPA's notice that it proposed to modify the 446 permits with respect to turbidity and arsenic, the proposed modifications which EPA sent to DEC for certification did not alter the settleable solids limitation, which remained at the 0.7/1.5 level. (App. 91)

With respect to State certification, the proposed modification referred exclusively to limitations for turbidity and arsenic. (App. 100)

Pursuant to the notice sent out by EPA, EPA and the State DEC held joint hearings on the proposed modification of the 446 existing NPDES permits and to issue 93 new permits for placer mining operations in the State, a total of 539 individual NPDES permits. (App. 46) Based on the notification that turbidity and arsenic were the only conditions being modified, Petitioner MAC members submitted comments only in regards to those and not any other permit conditions. (App. 81) Only after EPA and DEC held their two public hearings on the permits, did DEC publicly announce that it intended to modify the settleable solids limitation in the 446 permits and certify a settleable solids limitation of 0.2ml/l. (App. 47)

The 60-day period in which the State was to have certified came and went. Finally, on April 29, 1985, 88 days after EPA initiated the certification, DEC certified *en masse* the 539 NPDES permits and inserted in each and every one of the permits a settleable solids effluent limitation of 0.2ml/l. (App. 115-16) As authority for certifying a settleable solids effluent of 0.2ml/l, the State referred to a State water quality standard which did not even provide for settleable solids until nearly two months after the State certified the settleable solids effluent. (App. 58-59, 73-74, 77-79, 82-83, 108) Moreover, the certification failed to indicate the degree to which the settleable solids limitation or any other limitations could be made less stringent and still comply with State water quality standards. (App. 115-16) In retrospect, this is not

surprising since, "DEC readily admits that it neither performed site-specific evaluations nor considered information contained within individual NPDES applications in its certification process." 778 P.2d at 1131 (footnote omitted). (App. 8)

On May 6, 1985, Petitioner MAC, an association of numerous placer miners who have been directly affected by the actions of the State in certifying *en masse* the 539 NPDES permits, filed suit in the Alaska Superior Court, seeking injunctive relief on several grounds. 778 P.2d at 1130. (App. 6, 37) Among these grounds were: that the State had illegally conducted a mass certification instead of certifying on an individual, case-by-case basis as required by law; that the State had waived any right to certify the permits by failing to certify within the 60-day period prescribed by law; that the inclusion of the 0.2ml/l settleable solids effluent in each of the 539 permits was done without proper notice and hearing and violated the procedural due process rights of the permittees; and that the 0.2ml/l solids effluent is overly stringent and arbitrary so as to effect a taking of property in violation of the Fifth and Fourteenth Amendments.

Also subsequent to the State's certification, a number of parties, including Petitioner and several individual miners, filed timely requests with DEC for an administrative adjudication of the certification. These requests were granted and the matters were consolidated. In addition, Respondents Trustees for Alaska (TFA) and Northern Alaska Environmental Center (NAEC) intervened in Petitioner's superior court suit. The superior court continued its proceedings and retained jurisdiction pending a ruling by the DEC Deciding Officer. 778 P.2d at 1130. (App. 6)

During the administrative hearing, Petitioner renewed the arguments made in support of its complaint for injunctive relief. (App. 117-19) At the adjudicatory hearing itself, many miners were afraid to or prohibited from testifying due to pending or threatened EPA enforcement actions. (App. 147) After the hearing, the Deciding Officer upheld DEC's certification. In short, the Deciding Officer ruled that DEC was not required to certify on a site-specific, case-by-case basis and could legally certify on a mass basis; that while the State did indeed certify in an untimely manner, well outside the 60-day limit, arguments as to the State's waiver of any right to certify should be made to EPA and not in the State adjudicatory system; that DEC gave proper public notice and held proper public hearings so as to allow DEC to certify the 0.2ml/l settleable solids effluent limitation in each of the 539 NPDES permits; and that the 0.2ml/l limitation was not overly stringent and arbitrary. (App. 52-62)

Petitioner appealed the administrative decision to the superior court, raising again the issues presented in this Petition. (App. 120-23) The superior court in essence echoed the Deciding Officer's conclusions and affirmed the administrative decision. (App. 37-43) Petitioner then appealed to the Alaska Supreme Court on August 28, 1987. (App. 124-25) After a lengthy period, the Alaska Supreme Court rendered its decision.

With respect to Petitioner's contention that the State is required to certify NPDES permits on an individual, site-specific basis rather than *en masse*, the Alaska Supreme Court first examined the various regulations governing State certification of federal licenses and permits. The court took particular note of 40 C.F.R.

§ 121.2(a)(2) which requires the certifying agency to provide a statement that the agency has either examined the permittee's application made to the federal permitting agency and bases its certification upon water quality related information contained in the application, or has examined other information furnished by the permittee so as to allow the certifying agency to state with reasonable assurance that the permit's terms will comply with State water quality standards. 778 P.2d at 1132. (App. 10-11) In addition, the court took note of 40 C.F.R. § 124.53(e)(3) which requires that the State's certification of an NPDES permit be in writing and include a "statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards." *See* 778 P.2d at 1132. (App. 11-12) Despite the above C.F.R. provisions, the court concluded that the Clean Water Act does not require States to certify NPDES permits on an individual, case-by-case basis:

> These provisions, particularly the requirements of 40 C.F.R. § 121.2(a)(2), indicate that site-specific matters may be important considerations in the certification process. However, we do not believe that the federal regulations implementing the Clean Water Act can be read to require states to certify draft NPDES permits on a case-by-case basis.

Id. (App. 12) Beyond providing for reasonable assurance that individual permittees will comply with State water quality standards, the regulations were viewed by the court as being "virtually silent as to what procedures states should employ in certifying draft NPDES permits." *Id.* at 1132-33. (App. 12)

The Alaska Supreme Court also considered, but dismissed summarily, the observation of a federal district court that water quality based effluent limitations must be based upon site-specific examination of the pertinent water body:

> No reported cases have considered whether states must certify NPDES permits on an individual rather than a group basis, although a federal district court has noted in dictum that "effluent limitations are established by individual examination of the waterway." *Homestake Mining Co. v. United States Envtl. Protection Agency*, 477 F.Supp. 1279, 1286 (D.S.D. 1979) (court paraphrasing an EPA General Counsel's decision).

778 P.2d at 1133. (App. 13) The *Homestake* court's observation was discussed no further. Yet, consistent with the *Homestake* decision, the Alaska Supreme Court added that "Alaska water quality standards apply to individual dischargers, *not* to industries or *groups* considered as a whole." 778 P.2d at 1133 n.11 (emphasis added). (App. 14)

In the end, the Alaska Supreme Court based its conclusion upon general statements contained in the legislative history of the Clean Water Act. The court reasoned that since the legislative history of the Act suggests that States are to play a large role in regulating potential polluters and since (in the court's view) "the Clean Water Act and its implementing regulations[] lack . . . specific requirements governing states' NPDES certification procedures," the Alaska DEC was not required to certify the NPDES permits on an individual, case-by-case basis and could instead certify the permits on a *group* basis. 778

P.2d at 1133-34. (App. 14-15) The court added that the mass certification was thus reasonable since it might be difficult for DEC to conduct the requisite site-specific evaluations. 778 P.2d at 1134 n.11. (App. 15)

With respect to Petitioner's argument that by failing to certify within the 60-day period prescribed by law, the State had waived any right it had to certify (App. 129-32), the Alaska Supreme Court did little more than take note of the fact that the State could waive its right to certify, in which case "the NPDES permits are issued as originally proposed by EPA." 778 P.2d at 1129, 1135 (citing the 60-day waiver requirement). (App. 3, 17-18) Petitioner's waiver argument was then disposed of by the court at the end of its opinion. "We have reviewed all of the remaining specifications of errors which have been advanced by TFA, NAEC, and MAC and have concluded that they are without merit." 778 P.2d at 1140. (App. 31) Petitioner's argument that the State had modified the settleable solids effluent in the 446 NPDES permits without the notice and hearing required by law (App. 127-28, 132), suffered a similar fate.

With respect to Petitioner's argument that the 0.2ml/l settleable solids effluent was overly stringent and arbitrary so as to effect a taking of property (App. 133-36), the Alaska Supreme Court noted Petitioner's contention. 778 P.2d at 1135. (App. 19) The court, however, gave the argument short shrift and concluded that in view of the facts and circumstances, the 0.2ml/l limitation was a reasonable exercise of the State's regulatory power. 778 P.2d at 1135-37. (App. 18-23)

As pointed out to the Alaska Supreme Court on petition for rehearing, in the aftermath of the mass certification, Petitioner MAC members and other miners have endured a host of problems, both administratively and in the court system. (App. 74-75, 81-82, 84-88) Since EPA is but an "interested observer" of the certification process, *Marathon Oil Co. v. E.P.A.*, 830 F.2d 1346, 1351 (5th Cir. 1987), and since absent the required State statements, EPA has no authority to determine whether the limitations certified by the State are more stringent than required to meet State water quality standards, *Roosevelt Campobello International Park Commission v. E.P.A.*, 684 F.2d 1041, 1056 (1st Cir. 1982); *Lake Erie Alliance v. U.S. Corps of Engineers*, 526 F.Supp. 1063, 1074 (W.D.Pa. 1981), *affirmed* 707 F.2d 1392 (3rd Cir. 1983), *cert. denied*, 464 U.S. 915 (1983), when miners have attempted to obtain EPA evidentiary hearings on the extent to which their effluent limits could be relaxed as to settleable solids, turbidity, and arsenic, the miners have struck a brick wall. (App. 142-43) These ongoing evidentiary hearings are presently pending before EPA (App. 82, 85-88), and their result is directly contingent upon the validity or invalidity of the State's certification. 40 C.F.R. § 124.55(b). Moreover, the State's mass certification practice shows no signs of stopping. 778 P.2d at 1130 n.7. (App. 6-7)

As noted, the State's mass certification has also resulted in numerous miners being brought before the federal district court. (App. 81-82, 84-85) In one suit in particular, EPA has charged one miner and her husband, who have mined together for nearly 30 years, with numerous violations of their 1985 NPDES permit, all but one of which relates to the 0.2ml/l settleable solids effluent limitation incorporated into their modified permit as a result of State certification. (App. 81-82)

As such, the two (both MAC members), and other miners as well, face the exaction of severe penalties, civil, criminal and administrative, as a result of the State's illegal certification. *See* 33 U.S.C. §§ 1319, 1365.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the Alaska Supreme Court has decided significant federal questions in a way which is in direct conflict not only with the decisions of various federal courts of appeal, but also with applicable decisions of this Court. Even if these conflicts did not exist, the Alaska Supreme Court has decided important questions of federal law concerning the scope and administration of a major environmental statute and the relation between the statute and the property and liberty rights of individuals. Given the broad applicability of the Clean Water Act, with tens of thousands of NPDES permits being issued nationwide, if Alaska remains unchecked in its error, the practice of mass certification and the inclusion of overly-stringent water quality based effluent limitations in NPDES permits is bound to work its way south, if it has not already. Moreover, in the wake of the State's certification, the number of miners in Alaska has decreased dramatically. The potential for such economic dislocations spreading elsewhere in the Nation militates strongly in favor of this Court's checking the State's practice in its incipient stage. Under Supreme Court Rule 17.1(b)-(c), these special and important reasons well warrant this Court's granting review via writ of certiorari. Petitioner will address these reasons concisely below.

I.

THE STATE MUST CERTIFY WATER QUALITY BASED EFFLUENT LIMITATIONS ON AN INDIVIDUAL, CASE-BY-CASE BASIS.

Initially, Petitioner submits that the Alaska Supreme Court is simply wrong in its conclusion that the Clean Water Act and its implementing regulations do not require individual, case-by-case consideration when the State is certifying an NPDES permit. 40 C.F.R. § 121.2(a)(2) specifically requires individual, site-specific consideration of an NPDES permittee's application. Furthermore, it is difficult to imagine how the State can provide the statement required by 40 C.F.R. § 124.53(e)(3), a "statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards," without giving individual consideration to a permittee's application.

In *Marathon Oil, supra,* the Fifth Circuit specifically criticized the Alaska DEC's misunderstanding of 40 C.F.R. § 124.53(e)(3), and pointed out DEC's error. In that case DEC, oddly enough, certified an NPDES permit individually, on a very site-specific basis. *See* 830 F.2d at 1349-53. During the course of its opinion, the Court of Appeals on several occasions noted that DEC labored under the erroneous view that it could not specify conditions less stringent than those contained in the draft permit. *Id.* at 1351 & n.26, 1352 & n.35, 1353. Yet, in a schizophrenic burst DEC did include in its certification a boiler plate § 124.53(e)(3) statement that the draft permit *"cannot be made less stringent without violating the requirements of Alaska state law and regulations* including Alaska

water quality standards." 830 F.2d at 1353 (quoting DEC's cover letter accompanying its Certificate of Reasonable Assurance) (emphasis supplied by the court).

When EPA promulgated 40 C.F.R. § 124.53(e)(3), the Administrator explained the purpose of the provision and that it does indeed mean what it says:

> Some problems have resulted from the practice of certifying draft permits, which practice has arisen from the practical difficulties of certifying applications. In particular, certifications have not always clearly stated exactly what conditions are necessary to comply with State law and whether less stringent conditions would also satisfy State law. The final regulations remedy these problems by requiring States to set forth *in all cases* the minimum terms and conditions which will be necessary to comply with applicable law. For example, if a State certifies a permit with an effluent limitation imposing a daily maximum BOD of 25mg/l, it will be required to identify also a ceiling representing the minimum level of control, such as 30mg/l or 40mg/l, which the State finds necessary to comply with State law.

44 Fed. Reg. 32880 (emphasis added). EPA recognized the burden this procedure places upon States, but found any alternative to be unacceptable. *Id.*

The State of Alaska's mass certification of NPDES permits is directly contrary to the Clean Water Act's conception of the NPDES permitting process as one involving individual, adjudicatory determinations. In *Seacoast Anti-Pollution League v. Costle*, 527 F.2d 872 (1st Cir. 1978), *cert. denied*, 439 U.S. 824 (1978), the Court of Appeals explained that the NPDES permitting process is

by nature an adjudicatory one; its purpose is to determine facts in particular cases, not to promulgate policy-type rules or standards. 572 F.2d at 876. In *Marathon Oil Co. v. E.P.A.*, 564 F.2d 1253 (9th Cir. 1977), that Court of Appeals made similar observations. In contrast to other proceedings under the Clean Water Act, which provide for the promulgating of *technology* based effluent limitations, the NPDES permitting process itself focuses on the adjudicatory application of particular effluent limitations to individual permittees; it is not designed for the promulgating of policy-type rules or standards. 564 F.2d at 1262. In opposition, the State has turned the permitting process on its head by failing to certify on an individual basis, and instead improperly promulgating a policy-type rule, a 0.2ml/l settleable solids limitation which it inserted in each and every one of the 539 NPDES permits.

The State's failure to certify on an individual basis is particularly noteworthy since it involves the imposition of a water quality based effluent limitation, as opposed to a technology based one. In *E.P.A. v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976), Justice White clearly explained that while technology based effluent limitations may be imposed on an industry-wide or group basis, water quality based effluent limitations must be the result of individualized consideration of the receiving waters and the situation of the permittee:

> Congress contemplated that there may be some States, which would elect not to develop an NPDES program but would nonetheless determine – as § 510 permits – to adopt water quality standards or other limitations stricter than those EPA itself has promulgated and would otherwise apply. This being the case,

> Congress must have contemplated that the EPA was capable of issuing permits in that State . . . and of enforcing those stricter standards. Some of those standards – in fact *all but those pegged to the quality of the receiving waters* – could be translated into permit conditions for each discharger without coordinating the conditions in the other permits, because the effluent limitations in the Amendments are technology based and the timetable by which compliance is to be achieved is not made to depend on the performance of other dischargers. *Other standards, primarily those involving water quality standards, would require coordination among the permit conditions of numerous pollutors . . . and it is evident that Congress contemplated that the EPA was capable of carrying out this function as well.*

426 U.S. at 219-20 (emphasis added).

The clear wording of the relevant provision of the Act is that water quality based effluent limitations must be "*necessary* to *meet* water quality standards." 33 U.S.C. § 1311(b)(1)(c) (emphasis added). The use of the words "necessary" and "meet" in this context requires an individual, site-specific determination of the necessity for a given water quality based effluent limitation. As such, the Act does not provide broad license to regulate in the name of water quality. The power to impose a water quality based effluent limitation is circumscribed by the necessity for the limitation being as stringent as it is. *Cf. Natural Resources Defense Council v. E.P.A.*, 273 U.S. App. D.C. 240, 859 F.2d 156, 208 (1988).

In sum, the State's mass certification practice contravenes the NPDES permitting process as envisioned in the Clean Water Act and its implementing regulations. The Alaska Supreme Court's decision in this respect is in

direct conflict with the provisions of the Act as construed by this Court and federal courts of appeal. Given the thousands of NPDES permit certifications which have occurred under the Clean Water Act, this case stands alone as the sole reported decision involving a mass certification. As the Chief Justice observed in another context, the unprecedented nature of the State's mass certification attests not to its correctness but to its error. *Leo Sheep Co. v. United States*, 440 U.S. 668, 686 (1979). "It is some testament to common sense that the present case is virtually unprecedented." *Id.*

II.

BY FAILING TO CERTIFY WITHIN THE 60-DAY PERIOD PRESCRIBED BY LAW, THE STATE WAIVED ANY RIGHT TO CERTIFY THE NPDES PERMITS.

The purpose behind the time requirement in the certification process is to protect the permittee so that his application is not frustrated by State delay. House Report No. 92-911 at 122 (March 11, 1972) (1972 House Report). When EPA promulgated 40 C.F.R. § 124.53, the Administrator accordingly explained:

> Many commenters objected to the delays caused by the State certification process in the NPDES program. Specifically they thought that the provision in the proposal for potentially allowing a State one year to certify was unconscionable. In response to those comments the regulations have been modified so that the right to certify will be deemed waived unless exercised within a *specified* reasonable time which shall not exceed 60 days unless the Regional

> Administrator finds that unusual circumstances require a longer time.

44 Fed. Reg. 32880 (emphasis in original).

Under 40 C.F.R. § 124.53(c)(3), EPA may, of course, advise the State that it will have less than 60 days in which to certify. 42 Fed. Reg. 37115. For the State to exceed the 60 days, however, the State must first notify EPA *in writing* that more time is needed for evaluating the permit. *Id.* EPA is not required to grant such a request. *Id.*

In this case there is no evidence whatsoever that the State requested by any means, much less in writing, an extension of the certification period or that EPA granted this imaginary request. Where, as here, the State fails to certify within the prescribed period, "then the certification requirement *is* waived." 1972 House Report at 122 (emphasis added). In the words of the Act, "[i]f the State . . . refuses to act on a request for certification within [the prescribed] period of time . . . after receipt of such request, the certification requirements of this subsection *shall* be waived with respect to such federal application." 33 U.S.C. § 1341(a)(1) (emphasis added); *see* 40 C.F.R. § 124.53(d). If the State fails to certify within a required time, waiver is *automatic. Environmental Defense Fund v. Alexander*, 501 F.Supp. 742, 771 (N.D.Miss. 1980), *affirmed in part, reversed in part on other grounds*, 651 F.2d 983 (5th Cir. 1981), *on remand*, 554 F.Supp. 451 (N.D.Miss. 1981).

During the case, the State's arguments have boiled down to asserting that since EPA accepted the State's untimely certification, any challenge to the timeliness of the State's certification must be brought before EPA.

What the State's position ignores is that the 1972 CWA Amendments were crafted to give EPA no authority to review the propriety of the State's certification. 1972 House Report at 124. As to certification, EPA can do no more than perform services of a technical nature, and even then only upon the State's request. *Id.* Therefore, "EPA has no authority to ignore the State certification," *Roosevelt Campobello, supra,* 684 F.2d at 1056, and cannot "look behind" the certification, "beyond the bare inquiry as to whether the certification is affixed to the permit." *Town of Sutton v. Water Supply and Pollution Control Commission,* 116 N.H. 154, 355 A.2d 867, 870 (1976). As noted previously, EPA is merely an "interested observer" of the certification process. *Marathon Oil, supra,* 830 F.2d at 1351.

Very recently, this Court considered another 60-day requirement in an environmental statute. *Hallstrom v. Tillamook County,* ___ U.S. ___, 58 U.S.L.W. 4007 (1989). This Court affirmed that absent a strong reason for giving such a time requirement a flexible or pragmatic construction, the requirement should be enforced according to its literal meaning. 58 U.S.L.W. at 4009-10. Here there can be no strong reason for disregarding the 60-day requirement and allowing the State's 88-day certification to stand; *the purpose of the time requirement itself is to protect the permittee.* 1972 House Report at 122; 44 Fed. Reg. 32880. As Justice O'Connor observed, "[t]he language of this provision could not be clearer." *Hallstrom,* 58 U.S.L.W. at 4009. The requirement is not "may" but mandatory. Once the 60-day period lapsed, the State was without jurisdiction to certify the NPDES permits.

III.

THE STATE ILLEGALLY INSERTED THE 0.2ML/L SETTLEABLE SOLIDS EFFLUENT LIMITATION IN THE 446 NPDES PERMITS WHICH EPA PROPOSED TO MODIFY ONLY WITH RESPECT TO TURBIDITY AND ARSENIC.

40 C.F.R. § 122.62 provides in relevant part as follows: "When a permit is modified, only the conditions subject to modification are reopened." Concerning the apparent predecessor to 40 C.F.R. § 122.62, this Court in *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980), *rehearing denied*, 446 U.S. 947 (1980), unanimously concluded:

> We agree with the position advanced by petitioner that respondents may not reopen consideration of substantive conditions contained within the 1975 permit through hearing requests relating to a proposed permit modification that did not even purport to affect those conditions.

445 U.S. at 217. Contrary to this Court's conclusion in *Costle*, the State, after expressly waiving in 1984 any right to certify a more stringent settleable solids effluent limitation in the 446 permits, seized upon its opportunity to certify the EPA-proposed modifications for turbidity and arsenic as a means to reopen the 1984 permits with respect to the settleable solids effluent limitation, which was not among the substantive conditions of the permit which the proposed modification purported to affect.

Moreover, as a matter of due process, the individual permittees were entitled to know specifically that the State was intending to modify the permits with respect to settleable solids and to be heard individually in response

to the proposed modification. *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 242-43 (1973). As it was, miners went to the two public hearings on the proposed modifications with no idea that the State was intending to modify their permits with respect to settleable solids, and accordingly did not submit comments or testify in regard to a more stringent settleable solids limitation. (App. 81) The State's announcement to certain members of the public, after the two hearings were history, that the State intended to certify a 0.2ml/l settleable solids effluent limitation for each of the 446 permits (App. 47), does not suffice to satisfy the central constitutional safeguard of due process.

IV.

THE STATE EFFECTED A TAKING OF PRIVATE PROPERTY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS BY CERTIFYING THE SAME WATER QUALITY BASED EFFLUENT LIMITATION FOR SEVERAL HUNDRED PERMITS WITHOUT DEMONSTRATING THAT SUCH A STRINGENT LIMITATION IS NECESSARY TO MEET STATE WATER QUALITY STANDARDS IN EACH INDIVIDUAL CASE.

The mining claims and mineral interests which the NPDES permits purport to regulate are, of course, property rights in the full sense, and thus within the protection of the Fifth and Fourteenth Amendments' prohibition against the taking of private property for public use without just compensation. *Best v. Humboldt Mining Co.*, 371 U.S. 334, 335 (1963); *Union Oil Co. v. Smith*, 249 U.S. 337, 349 (1919). As such, regulation under

the Clean Water Act can effect a taking of a miner's property in violation of the Constitution. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985).

The essential attribute of the right to mine gold is the ability to exercise that right profitably and subject only to reasonable government regulation that does not go too far. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922). So unique is the property right to mine gold that where a gold miner, as most do, has a claim for mining purposes only, if the result of government regulation of his property is such so as to make it economically unfeasible to mine, his claim is effectively taken from him, extinguished, and he is left with nothing at all, *United States v. Coleman*, 390 U.S. 599, 602-03 (1968), except his right to just compensation. *Pennsylvania Coal*, 260 U.S. at 416; *see Armstrong v. United States*, 364 U.S. 40, 44-48 (1960). Prior to the overly-stringent regulation, however, his mining claim is by definition a reasonable investment-backed expectation. *Coleman*, 390 U.S. at 602-03.

As Justice Brennan explained in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), one measure of a violation of the Takings Clause is whether the government regulation frustrates distinct investment-backed expectations. *Id.* at 124-25, 127. In this case, with respect to the 446 NPDES permittees in particular, they had every reasonable expectation that their settleable solids effluent limitation would be the 0.7/1.5 figure, and had structured their operations accordingly. When the State then in late April, a few weeks before the short northern mining season begins, surprised them with the "unnoticed" settleable solids modification, their distinct and reasonable investment-backed expectations vanished.

Regardless of the reasonableness of the 0.2ml/l limitation itself, the miners were at the very least entitled to fulfill their distinct, reasonable expectations and to be given more sufficient time, until the next mining season, to comply with the surprise limitation. *United States v. Locke*, 471 U.S. 84, 108 (1985).

Where, as here, a State is conditioning the issuance of a permit upon compliance with certain restrictions, the Takings Clause further requires that the restrictions contained in the permit must substantially advance a legitimate State interest and must not single out the permittee, individually or as part of a distinct group, to bear the burden of remedying or preventing a problem beyond his own proportionate causal responsibility. *Nollan v. California Coastal Commission*, 483 U.S. 825, 834-35 & n.4 (1987); *Pennell v. City of San Jose*, ___ U.S. ___, ___-___, 108 S.Ct. 849, 861-64, 99 L.Ed.2d 1, 19-22 (1988) (Scalia, J., dissenting). To comply with this constitutional safeguard, the State must establish a close nexus between the permit term and any evil the term purports to address. *Nollan*, 483 U.S. at 837. As Justice Scalia explained in his *Pennell* dissent, the burden is on the State to demonstrate the "cause-and-effect relationship" between the evil which the permit term seeks to remedy or prevent and the *particular* permittee's property use restricted by the regulation. 108 S.Ct. at 862-63, 99 L.Ed. 2d at 19-21 (Scalia, J., dissenting). This burden the State of Alaska did not begin to meet.

While the evidence was necessarily limited by government intimidation of individual miners through pending or threatened enforcement actions and by the State's failure to conduct the requisite site-specific, case-by-case certification, the Deciding Officer did make pertinent findings of fact which were affirmed by the Alaska

Supreme Court. The nature of Alaska's rivers is such that they tend naturally to be heavily silted; yet, even the most heavily silted Alaska rivers, with a few exceptions, do not have measurable settleable solids. 778 P.2d at 1138. (App. 26-27) The "no measurable increase," minimum detectable limit for settleable solids is 0.1ml/l. 778 P.2d at 1136, 1138. (App. 19, 27) While the 0.2ml/l settleable solids effluent limitation applies to the point of effluent discharge, *prior* to entry into and dilution by the receiving water, the 0.1ml/l water quality standard involves a measurement at a point downstream *after* the effluent has been diluted in a mixing zone. 778 P.2d at 1138. (App. 27) Thus, since dilution ratios of effluent to receiving water ranging from 1:1 to 1:9 were found to exist at various sites, and taking such dilution reasonably into account, the 0.2ml/l settleable solids effluent was found, after dilution, to meet the State water quality standards in such cases. 778 P.2d at 1135-36, 1138-39. (App. 20-22, 26-27)

That the 0.2ml/l settleable solids effluent will meet the 0.1ml/l State water quality standard regardless of the site specifics, however, is precisely why the 0.2ml/l permit condition effects a taking of property. On a stream which has virtually no settleable solids to begin with, the low-end dilution ratio of 1:1 results in the 0.2ml/l effluent being diluted down to the 0.1ml/l water quality standard at the point of measurement. In layman's terms, this is as if one glass of effluent at 0.2ml/l were mixed with a glass of river water and thus diluted in half to 0.1ml/l. Therefore, on a similar stream where the dilution ratio is instead 1:9, the 0.2ml/l effluent limitation is severely over-stringent. Again, in layman's terms, this is comparable to mixing one glass of effluent with nine glasses from

the river and diluting the effluent accordingly. On such a stream, a settleable solids effluent of 1.0ml/l would suffice, after dilution, to meet the State water quality standard.

The unique facet of the certification process, and of 40 C.F.R. § 124.53(e)(3) in particular, is that it serves as a prophylactic against just such a Takings Clause violation. By requiring the State to indicate the necessary nexus, the cause-and-effect relationship between the pertinent State water quality standards and the stringency of any water quality based effluent limitations, 40 C.F.R. § 124.53(e)(3) (if properly complied with) works to curtail the violation of constitutional rights. To the contrary, the State of Alaska's mass certification practice fails to produce the necessary nexus between water quality standards and individual permit conditions, and by producing instead the 0.2ml/l settleable solids effluent limitation and other overly-stringent permit conditions, the State's practice amounts to no more than "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

The failure of the State's mass certification practice to establish the necessary nexus between water quality standard and effluent limitation "positively militates against the practice" of mass certification.[2] *Nollan*, 483 U.S. at 837

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[2] If the Act be interpreted differently than Petitioner suggests, *supra*, at 14-18, so as to allow for mass certification, then the Act itself suffers from a constitutional deficiency. As such, if reasonably possible, the Act should be construed narrowly so as to avoid future taking difficulties. *Riverside Bayview Homes, supra*, 474 U.S. at 128 & n.5. In view of this point, 28 U.S.C. § 2403(a) may be applicable.

n.5. In effect, the State's mass certification of NPDES permits threatens to lead to a lesser realization of the State's purported water quality goals, and encourages and suggests an impermissible, closed-door accommodation to benefit a particular interest group. *Id.*; *Pennell*, 108 S.Ct. at 863-64, 99 L.Ed. 2d at 21-22 (Scalia, J., dissenting). (App. 119, 136-37) The Clause, in contrast, serves to ensure an open, reasoned decision-making process, as a Constitutional Open Meetings Act of sorts. *Pennell*, 108 S.Ct. at 863-64, 99 L.Ed. 2d at 21-22 (Scalia, J., dissenting).

Last, the illegality of the State's certification is further borne out by its certifying certain NPDES permits on an individual, site-specific basis – including stating to which extent to which permit conditions could be made less stringent and still comply with State water quality standards, *see Marathon Oil, supra*, 830 F.2d at 1352-53 – while where miners are concerned, singling them out by lumping them into a pile and certifying their NPDES permits arbitrarily on a mass basis. *See Nollan*, 483 U.S. at 835 n.4; *cf. Dobbins v. City of Los Angeles*, 195 U.S. 223, 239-40 (1904). This practice of mass certification is by its very nature closed door so as to shut out the individual permittee from the exact process whereby the conditions of his existence are being determined.

In short, the burden was on the State to establish the necessity for the 0.2ml/l settleable solids effluent limitation in each individual permit; it was not incumbent on a miner to come forward and prove the contrary. If the State is then unable to utilize its vast resources (App. 143-46), to meet its burden by performing the requisite site-specific, case-by-case certification, it must exercise its option and (as it did in 1984) waive its right to certify

rather than arbitrarily imposing a burden on the individual permittees. This is but a modern-day application of an age-old principle. The State "may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

CONCLUSION

Within the past year, the wreck of the Exxon *Valdez* has focused the eyes of the Nation on Alaska and has brought environmental concerns to the forefront. Petitioner does not dispute the importance of the environment to all Americans, but instead submits that when State and Federal environmental authorities are exercising the power to regulate persons in their lives and occupations, those authorities must do so subject to the precious safeguards embodied in the Constitution and laws of our Nation. Whatever the necessity, ours remains a Nation governed by the rule of law, not of men.

For the reasons stated, Petitioner Miners Advocacy Council prays that the Court grant the petition for writ of certiorari.

DATED this 14th day of December, 1989, at Fairbanks, Alaska.

Respectfully submitted,

ROBERT JOHN #
WILLIAM R. SATTERBERG, JR.*
LAW OFFICES OF WILLIAM R. SATTERBERG, JR.
709 Fourth Avenue
Fairbanks, Alaska 99701
(907) 452-4454

Of Counsel
*Counsel of Record for Petitioner

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

MINERS ADVOCACY COUNCIL, INC., Appellant, v. STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; TRUSTEES FOR ALASKA; and NORTHERN ALASKA ENVIRONMENTAL CENTER, Appellees.	Supreme Court No. S-2369 4FA-85-1690 Civil *OPINION*
TRUSTEES FOR ALASKA and NORTHERN ALASKA ENVIRONMENTAL CENTER, Appellants, v. STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; DENNIS D. KELSO, Commissioner of the Department of Environmental Conservation; and MINERS ADVOCACY COUNCIL, INC., Appellees.	Supreme Court No. S-2370 4FA-86-1556 Civil [No. 3473 – July 28, 1989]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Jay Hodges, Judge.

July 28, 1989.

Rehearing Denied Sept. 18, 1989.

William R. Satterberg, Jr., Fairbanks, for Miners Advocacy Council, Inc.

Patti J. Saunders, Anchorage, and Robert W. Adler, Washington, D.C., for Trustees for Alaska and Northern Alaska Environmental Center.

John A. McDonagh, Asst. Atty. Gen., Fairbanks, Grace Berg Schaible, Atty. Gen., Juneau, for State, Dept. of Environmental Conservation, and Dennis D. Kelso.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

RABINOWITZ, Justice.

These consolidated appeals raise procedural as well as substantive challenges to the Alaska Department of Environmental Conservation's (DEC) certification of National Pollution Discharge Elimination System (NPDES) permits issued to placer gold miners in Alaska by the United States Environmental Protection Agency (EPA).

I. BACKGROUND AND PRIOR PROCEEDINGS.

To comply with the federal Clean Water Act,[1] a person wishing to discharge pollutants into waters of the

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[1] The statute commonly referred to as the Clean Water Act was originally enacted as the Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92-500, § 2, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387).

United States must secure an NPDES permit from EPA.[2] EPA may not issue an NPDES permit unless the resulting discharge will comply with state water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1342. Before EPA may issue a permit, it must also provide the state in which the discharge originates with an opportunity to review the draft NPDES permit to determine whether the permit's terms ensure compliance with the state's water quality standards. 33 U.S.C. § 1341(a), (d). A state then has three options. It may deny certification of the NPDES permit, thereby precluding EPA from issuing the permit. 33 U.S.C. § 1341(a)(1). The state may waive certification, thereby removing itself from the permitting process. *Id.* Finally, the state may certify the draft permit, and may include in its certification any conditions more stringent than those in the draft permit which the state determines are necessary to comply with state or federal water quality standards. 33 U.S.C. § 1341(a)(2). EPA must incorporate more stringent conditions suggested by a state into the final NPDES permit. *Id.*

In 1985, EPA notified the State of Alaska that EPA intended to modify 446 existing NPDES permits issued to placer gold miners, and to issue 93 new permits for placer mining operations in the state. The EPA notices clearly specified that the agency was proposing to issue 539

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[2] The Clean Water Act prohibits the discharge of any pollutant. 33 U.S.C. § 1311(a). Notwithstanding this prohibition, EPA may issue permits to discharge pollutants if the applicant meets certain specified conditions. *See* 33 U.S.C. § 1342.

individual NPDES permits. However, EPA did not prepare and send to the state 446 draft permits and 93 new draft permits. Instead, EPA sent DEC one draft NPDES permit to review because EPA intended to grant 539 identical individual permits.[3] The model draft permit proposed by EPA contained a settleable solids[4] effluent limit[5] of 1.5 milliliters per liter (ml/l) as an instantaneous maximum and 0.7 ml/l monthly average. Since EPA planned to grant identical NPDES permits to every placer miner who applied for a permit, these settleable solids standards would have applied to each applicant.

The agency charged with carrying out the NPDES certification process for the State of Alaska, DEC, also

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[3] EPA eventually issued 539 individual NPDES permits identical in all respects except for more lenient turbidity limits contained in 72 permits, based on site-specific information EPA received from individual miners.

[4] Introduction of settleable solids into streams occurs when placer miners remove and process overburden in order to reach gold-bearing gravels. When fine sediment settles to stream bottoms, it can adversely affect fish spawning areas, alter water chemistry, and generally reduce the biological productivity of the streams. High sediment loads can also adversely affect streams' value for recreational and subsistence uses. A 1984 report issued by DEC termed pollution from placer mining "the largest environmental pollution problem in Alaska today." Alaska Dep't of Envtl. Conservation (Div. of Envtl. Quality, Water Quality Mgmt. Section), *Water Management in Alaska: 1984 Update* 12 (June 1984).

[5] An effluent limit sets maximum limits for pollutant concentrations in discharges from mining operations. Pollutant concentrations may be diluted when waste water from mining operations enters a stream.

treated the 539 draft permits for placer mines as a group. Federal regulations require a state certifying agency to include in its certification of a draft NPDES permit "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3). When it certified the draft NPDES permits, DEC provided EPA with one such statement applicable to all 539 permits. However, DEC conditioned its blanket certification on adoption of a more stringent settleable solids standard of 0.2 ml/l, which DEC determined was necessary to ensure that placer mining operations could meet state water quality standards. The Alaska water quality standard for settleable solids is "[n]o increase in concentrations of sediment, including settleable solids, above natural conditions." 18 AAC 70.020. DEC interprets this standard to mean no measurable increase above natural conditions. Since standard measuring techniques can detect settleable solids concentrations down to approximately 0.1 ml/l, a concentration above the natural level of almost all Alaskan streams, DEC interprets 0.1 ml/l as the state water quality standard for settleable solids. Appellants do not challenge this interpretation.

Given the fact that DEC issued one certification and statement of reasonable assurance applicable to all 539 draft permits, the 0.2 ml/l limit for settleable solids applied to every draft permit. In accordance with the requirements of the Clean Water Act, EPA incorporated this limit into the final individual NPDES permits the agency issued to Alaskan placer miners. After EPA issued the final permits, a number of parties, including the parties to this appeal and several individual miners, filed

timely requests for an administrative adjudication of DEC's certification of the draft NPDES permits pursuant to 18 AAC 15.200.[6] These requests were granted and the matters consolidated. In addition, Miners Advocacy Council, Inc. (MAC), filed suit against DEC in superior court challenging the certification. Trustees for Alaska (TFA) and Northern Alaska Environmental Center (NAEC) intervened in the suit. The superior court continued its proceedings and retained jurisdiction pending a ruling by the DEC Deciding Officer. After an adjudicatory hearing, the Deciding Officer upheld DEC's certification. TFA, NAEC, and MAC appealed this decision to the superior court, which affirmed the Deciding Officer's conclusions. These consolidated appeals followed.[7]

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[6] This section of the Alaska Administrative Code allows any person to request an adjudicatory hearing pertaining to DEC decisions concerning NPDES certifications, as well as other decisions on water quality related permits and variances.

[7] Federal regulations implementing the Clean Water Act require EPA to issue NPDES permits for a fixed time period not to exceed five years. 40 C.F.R. § 122.46(a). The 539 NPDES permits at issue in this case, which EPA issued in 1985, expired on December 31, 1986.

In 1986, EPA issued an additional 104 NPDES permits to placer miners. These permits also expired on December 31, 1986. DEC certified these permits as a group, just as it did with the permits involved in the instant litigation. The permits issued in 1986 differed in one significant respect from those issued in 1985. When EPA submitted the 1985 permits in draft form to DEC for certification, the permits contained a settleable solids effluent limit of 1.5 ml/l as an instantaneous maximum and 0.7 ml/l as a monthly average. EPA reduced this limit to 0.2 ml/l in the final permits because DEC made the reduction a

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condition of its certification. However, when EPA sent draft permits to DEC for certification in 1986, the permits already contained a settleable solids effluent limit of 0.2 ml/l. DEC therefore certified the permits without conditioning its certification on adoption of more stringent limits on settleable solids.

In 1987 and 1988, EPA issued a total of 367 NPDES permits to placer miners in three separate groups. These permits all expired on December 31, 1988. Like the 1986 permits, those issued in 1987 and 1988 already contained a 0.2 ml/l effluent limit on settleable solids when EPA sent the permits in draft form to DEC for certification. DEC certified the three groups of permits with three blanket certifications.

Under the series of events described above, we are of the view that the primary issue raised in this appeal by TFA and NAEC is not moot. These appellants argue that DEC's certification of the disputed NPDES permits was unlawful because the 0.2 ml/l settleable solids effluent limit contained within the permits does not ensure compliance with Alaska water quality standards. Since DEC has continued to certify NPDES permits containing a 0.2 ml/l settleable solids effluent limit, whether this limit ensures compliance with state standards remains an issue in controversy. It is irrelevant whether the 0.2 ml/l limit was set by DEC, as occurred with the 1985 permits, or whether EPA set the limit, as has happened since 1985. Regardless of which agency actually sets the final effluent limit, both federal and DEC regulations require that DEC certify only those draft NPDES permits which ensure that the permitted activities will not violate state water quality standards. Federal regulations require a state to include with its certification a statement that there is reasonable assurance that the permitted activity will not violate state water quality standards. 40 C.F.R. § 121.2(a)(3). DEC regulations, which prohibit activities which would violate state water quality standards, implicitly require DEC to certify only those permits which insure compliance with state standards. *See* 18 AAC 70.010.

II. MAY DEC CERTIFY DRAFT NPDES PERMITS FOR PLACER MINES AS A GROUP RATHER THAN INDIVIDUALLY?

We must first decide whether DEC may certify all 539 draft NPDES permits for placer mining activities as a group rather than on a case-by-case basis. DEC readily admits that it neither performed site-specific evaluations nor considered information contained in individual NPDES permit applications[8] in its certification process. DEC argues that case-by-case certification of all 539 placer mining NPDES permits is economically and administratively infeasible, and would provide less assurance of compliance with state water quality standards than the agency's group certification approach. TFA and NAEC concede that the state's blanket certification is valid as long as it ensures that no individual permit holder will violate state water quality standards.[9]

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[8] In a hearing before the Deciding Officer, DEC Water Quality Section Chief Randolph Bayliss admitted that, to his knowledge, DEC did not review information provided by individual applicants "during the certification period for [the] purpose of certification." DEC maintains that virtually all information submitted by individual miners applying for NPDES permits is insufficient and unreliable, and is therefore useless.

[9] In their brief, TFA and NAEC state the following:

> Nor is DEC prohibited from issuing a blanket, statewide certification, based on considerations of administrative feasibility, as long as the result is compliance with water quality standards at *all* locations, which would require an effluent limit of 0.1 ml/l for settleable solids. [Emphasis in original.]

This concession vitiates TFA and NAEC's argument that DEC is required by law to certify NPDES permits on a case-by-case basis.

MAC, on the other hand, contends that both federal law and DEC regulations require site-specific certification on a case-by-case basis. In a related claim, MAC argues that DEC's group certification is invalid because the 0.2 ml/l settleable solids effluent limit incorporated into every NPDES permit as a result of the certification constitutes a regulation which was not adopted according to the requirements of Alaska's Administrative Procedure Act.

At the administrative adjudication hearing, the DEC Deciding Officer expressly refused to decide whether DEC's group certification was "correct in its approach." The superior court, however, held that "[i]n light of economic and practical considerations, there is a reasonable basis to have a blanket certification for all 539 permits since any interested party may come in on a site-by-site basis and request a review." Both the Deciding Officer and the superior court concluded that DEC's imposition of the 0.2 ml/l settleable solids effluent limit on all NPDES permit applicants by means of the agency's blanket certification did not constitute a regulation.

We must first determine what standard of review to apply to this question. While DEC's knowledge and experience may be important factors in deciding as a practical matter whether to carry out NPDES permit certifications on a group or site-specific basis, the agency's expertise is irrelevant to the question of whether blanket certification is legally permissible. Whether the federal Clean Water Act and DEC regulations require the state to certify NPDES permits on an individual, site-specific basis or allow the state to issue a blanket certification covering many individual permits without performing site-specific evaluations is a question of law, which this court reviews

under the "substitution of judgment" standard. *See Earth Resources Co. of Alaska v. State, Dep't of Revenue*, 665 P.2d 960, 965 (Alaska 1983) (citing *Kelly v. Zamarello*, 486 P.2d 906, 916 (Alaska 1971)).

This brings us to consideration of MAC's contention that federal law requires DEC to certify NPDES permits individually using site-specific information. The Clean Water Act itself is silent as to this issue. The federal statute simply provides that "any applicant" for a permit must obtain certification from the state in which the discharge originates or will originate that, *inter alia*, the discharge will comply with state water quality standards. *See* 33 U.S.C. §§ 1313, 1341(a)(1). The Act also requires that state certifications "set forth [conditions] . . . and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations." 33 U.S.C. § 1341(d). While these provisions unambiguously require states certifying draft permits to provide assurance that every NPDES permit applicant will meet state water quality standards, they do not preclude certification of several permits as a group.

Similarly, federal regulations implementing the Clean Water Act do not specifically address whether states may issue one blanket certification for a number of NPDES permits. Regulations governing state certification of federal licenses and permits to conduct any activity which may result in discharges into waters of the United States require state certifications to include the following:

> A statement that the certifying agency has either (i) examined the application made by the applicant to the licensing or permitting agency

> (specifically identifying the number or code affixed to such application) and bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations, or (ii) examined other information furnished by the applicant sufficient to permit the certifying agency to make the statement [of reasonable assurance of compliance with state standards] described in paragraph (a)(3) of this section.

40 C.F.R. § 121.2(a)(2). Additionally, regulations dealing specifically with state certification of NPDES permits require such certifications to be in writing and include:

> (1) Conditions which are necessary to assure compliance with the applicable provisions of CWA [Clean Water Act] sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law;
>
> (2) When the State certifies a draft permit instead of a permit application, any conditions more stringent than those in the draft permit which the State finds necessary to meet the requirements listed in paragraph (e)(1) of this section. For each more stringent condition, the certifying State agency shall cite the CWA or State law references upon which that condition is based. Failure to provide such a citation waives the right to certify with respect to that condition; and
>
> (3) A statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards. Failure to provide this statement for any condition waives the right to certify or object to any less stringent condition which may be established during the EPA permit issuance process.

40 C.F.R. § 124.53(e). These provisions, particularly the requirements of 40 C.F.R. § 121.2(a)(2), indicate that site-specific matters may be important considerations in the certification process. However, we do not believe that the federal regulations implementing the Clean Water Act can be read to require states to certify draft NPDES permits on a case-by-case basis. Like the statute itself, the primary thrust of the regulations appears to be to ensure that states certify only those draft permits which provide assurance that individual permittees will comply with state water quality standards. Beyond that, the federal regulations are virtually silent as to what procedures states should employ in certifying draft NPDES permits.

Regulations promulgated by DEC governing its NPDES permit certification procedure also do not specifically address whether the agency must consider each draft NPDES permit separately. The regulations (i) simply require NPDES permit applicants to furnish the agency with copies of applications and supplementary information which applicants must submit to EPA, and (ii) authorize DEC to request further information.[10]

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[10] Department of Environmental Conservation regulations provide:

> *NPDES CERTIFICATION PROCEDURE* (a) Contemporaneous with the filing of an application for an NPDES permit, or for a modification or reissuance of an NPDES permit, with EPA, a copy of the application and all supporting information, together with a cover letter requesting certification, must be served on the central office of the department. If the certification request involves a modification to an NPDES

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No reported cases have considered whether states must certify NPDES permits on an individual rather than a group basis, although a federal district court has noted in dictum that "effluent limitations are established by individual examination of the waterway." *Homestake Mining Co. v. United States Envtl. Protection Agency*, 477 F.Supp. 1279, 1286 (D.S.D.1979) (court paraphrasing an EPA General Counsel's decision).

(Continued from previous page)

> permit which does not involve application, for which EPA does not intend to issue public notice, the department will require a copy of the proposed modification at least 60 days before any deadline established by EPA for certification action on the modification, or 60 days before the proposed effective date of the modification, whichever is the sooner. All supplementary forms or other information pertaining to the application must be served on the central office of the department at the time of their filing with EPA.
>
> (b) Within 30 days after receipt of an application for certification, the department will, if necessary, serve notice upon the applicant that additional information is necessary in order for the department to determine whether the discharge will comply with the applicable provisions of secs. 301, 302, 303, 306 and 307 of the FWPCA [Federal Water Pollution Control Act], and that the additional information must be served upon the department within 30 days after receipt of the request. If the information is not served upon the department within the time period specified, certification will be denied.

18 AAC 15.130. In addition, DEC regulations also provide for public notice and hearings on NPDES permit certifications, as well as specify the timetable and required form for the final certification decision. *See* 18 AAC 15.140-.170.

In the absence of any statutory or regulatory requirement that DEC certify draft NPDES permits on an individual basis, we conclude that DEC may issue a blanket certification for draft NPDES permits covering a number of permittees, provided the certification ensures that Alaska water quality standards will be met.[11] The Legislative history of the Clear Water Act, which reveals that Congress intended to give states broad power and discretion in the fight against water pollution, bolsters the conclusion that states have discretion to certify NPDES permits on a group basis if they choose to do so. For example, the Senate Report accompanying the 1972 amendments to the Clean Water Act provides that "[t]he States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States." S.Rep. No. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.Code Cong. & Admin.News 3668, 3669. Specifically discussing the NPDES certification process, the federal district court in *Mobil Oil Corp. v. Kelley*, 426 F.Supp. 230 (S.D.Ala. 1976), noted:

> A review of the legislative history of the [Clean Water Act] reinforces the plain meaning of the Act itself to the effect that Congress intended the states to play a paramount role in the certification of potential polluters.

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[11] Alaska water quality standards apply to individual dischargers, not to industries or groups considered as a whole; 18 AAC 70.010(a) provides that "[n]o person may conduct an operation that causes or contributes to a violation of the water quality standards set by this chapter."

Id. at 234. Additionally, the Clean Water Act and its implementing regulations' lack of specific requirements governing states' NPDES certification procedures provides further evidence that Congress and the federal executive branch intended to leave these procedures to the states' discretion. Since DEC regulations also do not explicitly mandate case-by-case certification, we reject MAC's contention that DEC is legally obligated to certify draft NPDES permits on an individual rather than group basis.[12]

III. DOES DEC'S IMPOSITION OF A 0.2 ML/L EFFLUENT LIMIT FOR SETTLEABLE SOLIDS ON ALL PLACER MINING OPERATIONS THROUGH DEC'S BLANKET NPDES PERMIT CERTIFICATION CONSTITUTE AN IMPROPERLY PROMULGATED REGULATION?

MAC specifies as error the rejection of its contention that the 0.2 ml/l effluent limit for settleable solids which was certified by the State of Alaska for the 1985 NPDES

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[12] In its resolution of this issue the superior court concluded that

> there is a reasonable basis for DEC's determination that .2 ml/l will comply with state water quality standards. It was reasonable for DEC to make a blanket determination in light of the economic and practical considerations of making a site-by-site determination. As stated above, if an interest group feels that a specific location will not meet water quality standards with a .2 ml/l effluent limitation, they have the opportunity to present evidence at a hearing and persuade DEC to change the effluent limitation at a particular site.

placer mining permits constitutes an illegally promulgated regulation. MAC's contention is that if the 0.2 ml/l effluent limit is a regulation, then it is invalid because the State of Alaska did not comply with the statutory requirements for enactment of a regulation when it adopted this standard.[13]

In our opinion, events since the issuance of the 1985 NPDES permits have rendered this issue moot. As noted earlier in this opinion, *see supra* note 7, the 539 NPDES permits at issue in this case expired on December 31,

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[13] The DEC Deciding Officer concluded that the 0.2 ml/l effluent limit for settleable solids which was certified by the State of Alaska was not a regulation. The Deciding Officer reasoned in part that the State had not promulgated a standard of general application. "Rather, the State was involved in a permitting action which pertained to particular 1985 permits for particular miners." The Deciding Officer further stated in his decision that to require certification actions by the State to comply with the time-consuming procedures for enactment of a regulation would render the certification actions incapable of being performed in a time-frame even approaching that set forth in the EPA and State regulations.

On appeal, the superior court rejected MAC's illegally-promulgated-regulation argument, reasoning in part as follows:

> Here as in *State v. Northern Bus Co., Inc.*, 693 P.2d 319, 323 (Alaska 1984), there is a sufficient regulatory scheme to permit DEC to adjudicate all the permits. The .2 ml/l effluent limit is an adjudication rather than legislation. Although the .2 ml/l effluent limit applies to a number of permits, it is an adjudication; an interpretation of existing regulations rather than promulgation of a regulation. Therefore, the Deciding Officer's ruling that the .2 ml/l effluent limit is not a regulation is AFFIRMED.

1986. All of the NPDES permits which the EPA issued in 1986, 1987, and 1988 already contained a 0.2 ml/l effluent limit on settleable solids at the time EPA sent the permits in draft form to DEC for certification. DEC certified the three groups of permits with three blanket certifications. As to the NPDES permits which were issued in 1986, 1987, and 1988, DEC simply certified the NPDES permits as proposed by EPA without imposing more stringent conditions than those set out in the draft permits. These certifications by DEC did not constitute the promulgation of *de facto* regulations.

In regard to the 1985 group certification by DEC, it was DEC, not EPA, which imposed the 0.2 ml/l settleable solids effluent limit on placer miners through its certification of the NPDES permits. DEC made its 1985 NPDES certification contingent on imposition of a more stringent effluent limit on settleable solids than the limit originally proposed by EPA. The Clean Water Act required EPA to incorporate the stricter limits cited by DEC into its final NPDES permits. *See* 33 U.S.C. § 1341(d). Therefore, the 0.2 ml/l limit was attributable to action by DEC, and this action was arguably regulatory in nature.

In contrast to the 1985 NPDES permits, the 0.2 ml/l effluent limit on settleable solids in subsequent permits is attributable to action by EPA. After 1985, the 0.2 ml/l limit was already contained in draft NPDES permits when EPA sent the permits to DEC for certification. States are powerless to alter draft NPDES permits during the certification process, except to make permit conditions more stringent. *See* 33 U.S.C. § 1341(d); 40 C.F.R. § 124.55(c). If a state does nothing, it waives certification, and the NPDES permits are issued as originally proposed

by EPA. *See* 40 C.F.R. § 124.53(c)(3). Therefore, DEC effectively had nothing to do with imposing the 0.2 ml/l limit on placer mining operations after its 1985 certification, even though it continued to certify NPDES permits containing the 0.2 ml/l limit on a group basis. MAC's claim that DEC violated Alaska's Administrative Procedure Act, AS 44.62.010-44.62.650, when it adopted a *de facto* regulation by imposing the 0.2 ml/l limit on placer miners is thus moot; while the 0.2 ml/l limit currently remains in effect, the agency responsible for this limit is now EPA rather than DEC. EPA is not subject to the requirements of Alaska's Administrative Procedure Act.

IV. DO THE CONDITIONS OF DEC'S CERTIFICATION ASSURE COMPLIANCE WITH ALASKA'S WATER QUALITY STANDARD FOR SETTLEABLE SOLIDS?

As noted previously, Alaska's in-stream settleable solids water quality standard requires no measureable increase in settleable solids above natural background conditions.[14] The record establishes that standard measuring techniques can detect settleable solids concentrations down to approximately 0.1 ml/l.

TFA and NAEC argue that DEC violated federal and state law by certifying the 539 draft NPDES permits for placer mines when some of the mines will violate state water quality standards even assuming they strictly comply with all the conditions and limitations of the permits.

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[14] 18 AAC 70.020(b) (Water Quality Parameter (7)) ("[n]o increase in concentration of sediment, including settleable solids, above natural conditions").

Specifically, TFA and NAEC maintain that the 0.2 ml/l effluent limit for settleable solids incorporated into each permit as a result of the certification process does not in all cases ensure that placer mine operations "will comply" with Alaska water quality standards.[15] The state disagrees; it maintains that the 0.2 ml/l limit provides "reasonable assurance" of compliance. MAC, on the other hand, argues that the 0.2 ml/l effluent limit is too stringent a standard.[16]

In regard to this issue, the Deciding Officer made the following relevant findings of fact:

> 17. The minimum detectable level for settleable solids using the Imhoff cone test is approximately .1 ml/l.
>
> 18. Virtually all placer miners who treat their effluent utilize settling ponds as the main treatment method.
>
> 19. To meet the permit's instantaneous maximum settleable solids effluent limitation of .2 ml/l, miners must, at a minimum, use properly designed, constructed and maintained settling ponds.

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[15] TFA not only seeks invalidation of the 0.2 ml/l effluent limit, but also requests this court to order DEC to modify its certification, with prompt notice of the modification to EPA and all 536 miners, to incorporate an effluent limitation of 0.1 ml/l for settleable solids.

[16] In part, MAC asks this court to void the 0.2 ml/l effluent limit for settleable solids and to hold that the original 0.7/1.5 ml/l effluent limit for settleable solids shall remain the enforceable figure until such time as DEC obtains the requisite information and properly certifies further NPDES permits.

20. Properly designed, constructed and maintained settling ponds will generally produce effluent with settleable solids concentrations of less than or equal to .1 ml/l. Properly designed, constructed and maintained settling ponds will result in in-stream settleable solids concentrations of less than .1 ml/l.

21. Placer miners who meet the instantaneous maximum of .2 ml/l settleable solids effluent limit will have in-stream settleable solids levels of less than .1 ml/l.

22. The draft permit's excess water bypass and out-of-stream settling pond requirements result in reduced water usage, increased treatment efficiency and increased amount of fresh water available for in-stream dilution, thereby increasing the assurance that the mining operation will meet state water quality standards.

23. The instantaneous maximum of .2 ml/l settleable solids effluent limit is close to the minimum detectable level for settleable solids. If one takes into account that this is an instantaneous maximum and if one makes an allowance for stream water dilution and infiltration dilution, the resultant in-stream settleable solids increase will be below the .1 ml/l minimum detectable limit.

24. Dilution ratios of effluent to receiving water of 1:1 to 1:9 are typical for Alaska placer mining operations.

25. It is reasonable to assume that there will be fresh water surface infiltration and fresh water subsurface infiltration prior to the discharge of the effluent from a settling pond into a stream.

In his conclusions of law pertaining to this issue of the reasonableness of the 0.2 ml/l effluent limit on settleable solids, the Deciding Officer stated:

> An argument has been made that an effluent limitation of .2 ml/l for settleable solids will not provide reasonable assurance of compliance with water quality standards. The Deciding Officer does not think that any requestor has sustained its burden of proof on this issue, and consequently this argument is rejected.
>
> The evidence indicates that, to meet the permit's .2 ml/l limit, a miner must use a properly designed, constructed and maintained settling pond. The evidence also indicates that such a settling pond will produce effluent with settleable solids concentrations of .1 ml/l or less. Furthermore, a placer miner who meets the .2 ml/l settleable solids effluent limit will have in-stream settleable solids levels of less than .1 ml/l, which is the minimum detectable limit. Such a level of settleable solids clearly satisfies the state water quality standard of "no measurable increase."
>
> The .2 ml/l effluent limitation is very close to the minimum detectable level for settleable solids. If one takes into account the excess water bypass provision in the draft permit as well as the out-of-stream settling pond requirement, the .2 ml/l limitation is a reasonable limitation. If one further takes into account in-stream dilution and increased treatment efficiency, the .2 ml/l limitation becomes even more reasonable as a limitation which will assure compliance with water quality standards.
>
> One can make additional observations about the appropriateness of the .2 ml/l limitation. There will be some infiltration dilution in placer mining operations. Furthermore, the .2

ml/l limitation is an instantaneous maximum. That is, the effluent can never exceed .2 ml/l at any time during the operation of a mining site. It is reasonable to assume that the effluent quality for settleable solids will generally be below .2 ml/l rather than right at .2 ml/l.

When these assumptions are made, and the evidence presented at the hearing indicates that these assumptions are in fact reasonable ones, the .2 ml/l effluent limitation for settleable solids clearly is a reasonable one. The evidence indicates that DEC is able to say with confidence that such a limitation will reasonably assure compliance with water quality standards.

TFA has argued that if one does not do a site-specific verification for settleable solids in effluent, then only an effluent limit of .1 ml/l will assure compliance with water quality standards. The assumptions underlying such an approach are not reasonable. While .1 ml/l will by definition assure that in every case there is no measurable increase in settleable solids concentrations above natural background, it is not necessary for the limitation to be that low to reasonably assure no measurable increase. TFA's argument assumes a worst case scenario in every case and ignores some reasonable assumptions about dilution, pond performance, and instantaneous maximums. The evidence presented at the hearing indicates that TFA's argument is not correct when applied to the real world and actual mining sites.

Dilution, instantaneous maximum considerations, actual performance of settling ponds – all these factors help to insure that the .2 ml/l limitation will assure compliance with the water quality standards. TFA has argued that if the effluent limitation is not at .1 ml/l or lower, then it is possible under some circumstances that

there will be a violation of water quality standards. The Deciding Officer does not interpret the CRA [Certificate of Reasonable Assurance] to mean that DEC has assured that there will never be an incident where a discharge from a placer mining site in the state increases the settleable solids concentrations in a stream. The CRA must be more reasonably interpreted. Can DEC certify that a limitation reasonably assures compliance with state water quality standards? If so, then the test is met. The evidence presented in this case indicates that DEC can satisfy this test with the .2 ml/l limitation.[17]

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[17] On appeal the superior court resolved the issue in the following manner:

> The court concludes that there was a reasonable basis for the administrative decision to include .2 ml/l settleable solid effluent limitation and therefore the Deciding Officer's decision upholding the .2 ml/l limitation should be upheld.
>
> As pointed out by DEC, practically and economically it would be impossible in any realistic way to conduct a site-by-site evaluation of each of the 539 placer miners requesting permits. Instead the agency determined that in all cases the .2 ml/l settleable solid effluent limitation would comply with the requirement that there would be no increase in concentrations above natural conditions of settleable solids.
>
> Either or both a permit applicant or an interested group such as TFA may request a hearing on an individual permit and present evidence to persuade DEC that the .2 ml/l limitation is either too restrictive or not restrictive enough. Therefore, any interested party may have a site-specific review of any of the permits so certified.
>
> In light of economic and practical considerations, there is a reasonable basis to have a blanket certification for all 539 permits since any interested party may come in on a site-by-site basis and request a review.

A. *Applicable Standards of Review.*

TFA and NAEC maintain that this court should apply the "substantial evidence" standard to determine whether the record supports DEC's finding that a 0.2 ml/l standard for settleable solids will lead to compliance with the state water quality standard. On the other hand, DEC argues that this case involves mixed issues of law and fact, and thus this court should defer to DEC's determination unless it lacks a reasonable basis.

Since the portion of DEC's decision construing statutes and regulations governing water pollution is clearly separable from its factual finding as to whether a 0.2 ml/l settleable solids effluent limit will lead to compliance with Alaska water quality standards, both standards of review are applicable. *See Pan Am. Petroleum Corp. v. Shell Oil Co.*, 455 P.2d 12, 20-23 (Alaska 1969).

In the instant case, the parties also disagree over the standard of certainty required of DEC'S NPDES certification under the Clean Water Act and federal and state regulations. This is essentially a legal question of statutory and regulatory interpretation. On such questions, we apply the deferential reasonable basis test. *See id.; Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982). The parties also dispute whether the 0.2 ml/l standard for settleable solids will lead to compliance with state water quality standards. We review such factual questions under the "substantial evidence" test. *See Storrs v. State Medical Bd.*, 664 P.2d 547, 555 (Alaska), *cert. denied*, 464 U.S. 937, 104 S.Ct. 346, 78 L.Ed.2d 312 (1983).

B. *Does DEC's Interpretation of the Standard of Certainty Required of Its Draft NPDES Permit Certification Have a Reasonable Basis?*

After reviewing the draft NPDES permit EPA intended to issue individually to 539 placer miners, DEC certified the permits (on condition that the limit for settleable solids be set at 0.2 ml/l) based on its conclusion that there was "reasonable assurance" that discharges resulting from the permitted activities would comply with, *inter alia*, Alaska water quality standards. TFA and NAEC take issue with the "reasonable assurance" standard, arguing that under the Clean Water Act and DEC regulations, DEC may not certify draft NPDES permits unless the agency assures "strict compliance" with state standards in all cases and at all discharge points.

Exactly how the standard of certainty advocated by TFA and NAEC differs from that employed by DEC is unclear. DEC does not argue that state standards may be exceeded under certain circumstances or at certain discharge points. Apparently, therefore, TFA and NAEC simply argue that DEC must provide something more than "reasonable assurance" of compliance with state water quality standards in its certification.

Under the "reasonable basis" test, this court will not lightly interfere with an administrative agency's interpretation of statutes and regulations which bear on discretionary determinations within the agency's area of expertise. *See, e.g., Rose,* 647 P.2d at 161. Here, DEC has authority to certify draft NPDES permits if it determines that the permits meet statutory and regulatory requirements.

We conclude that DEC's interpretation of the degree of certainty required of its certification under the Clean Water Act, as well as under federal and state regulations, has a reasonable basis. TFA and NAEC emphasize language in the Clean Water Act which requires states to certify that NPDES permittees "will comply" with state standards, as well as a DEC regulation which prohibits violations of Alaska water quality standards. *See* 33 U.S.C. § 1341(a)(1); 18 AAC 70.010(a). These provisions, however, do not necessarily require DEC to provide absolute certainty that permittees will never violate state standards, assuming this sort of guarantee is even possible. Moreover, DEC applied a "reasonable assurance" standard in accord with federal regulations implementing the Clean Water Act, which provide that states must include within a draft NPDES certification "[a] statement that there is a *reasonable assurance* that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3) (emphasis added).

C. *Does the Record Contain Substantial Evidence to Support DEC's Finding That a Settleable Solids Effluent Limit of 0.2 ml/l Provides Reasonable Assurance That All Permittees Will Comply with State Water Quality Standards?*

Randolph Bayliss, chief of DEC's Water Quality Management Section, described in an affidavit how DEC arrived at the 0.2 ml/l effluent limit for settleable solids applicable to placer mining operations:

> The certified permit condition (in this case, 0.2 ml/l settleable solids) applies to the discharge of placer mining waste *prior* to entry into and dilution by the receiving waters. The Water Quality Standard (in this case, no measurable increase in sediment) applies in the receiving waters after dilution in a mixing zone. The enforcement procedure would go like this: measure the settleable solids in the receiving waters upstream of a placer mining discharge, then measure the settleable solids a reasonable distance downstream of the placer mine discharge, say 500 feet. If there is a measurable increase, there would be a violation of the Water Quality Standards. This applies only to manmade increases above natural conditions, but in even the most heavily naturally silted rivers of Alaska, there are few with measurable settleable solids.
>
> Therefore,
>
> 1. with 0.1 ml/l being the lowest detectable gradation in the testing procedure, and
>
> 2. with a reasonable amount of dilution, there is a reasonable assurance that 0.2 ml/l in the discharge would not be measurable after mixing in the receiving waters, and, with that added condition, the permits could be certified as being in compliance for the Water Quality Standards for sediment.

(Emphasis and parentheticals in original.)

To support the 0.2 ml/l settleable solids limit, DEC maintains in its brief that "[i]f one makes some reasonable allowance for in-stream dilution of the .2 ml/l effluent prior to the in-stream measurement, the resultant water quality will . . . approach, if not fall below, the .1

ml/l minimum detectable settleable solids level." DEC asserts that this holds true regardless of any site-specific differences. The agency also argues that in order to consistently meet the 0.2 ml/l effluent limit for settleable solids, placer miners must install settling ponds. It further contends that properly constructed settling ponds will usually produce effluent which will contain settleable solid concentrations at or below 0.1 ml/l, even before dilution by the receiving stream. Finally, DEC asserts that "infiltration dilution" by groundwater, and requirements within the NPDES permits for excess water bypasses and out-of-stream settling ponds, provide further assurance that placer mining operations will not violate the state standard for settleable solids.

When reviewing an agency's factual findings, we review the whole record to determine whether the agency's findings "are supported by substantial evidence, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Galt v. Stanton*, 591 P.2d 960, 963 (Alaska 1979) (quoting *Keiner v. City of Anchorage*, 378 P.2d 406, 411 (Alaska 1963)). In this case, we hold that the record does not support DEC's finding that the 0.2 ml/l effluent limit for settleable solids provides reasonable assurance that all 539 NPDES permittees will meet state water quality standards.

DEC's finding that the 0.2 ml/l settleable solids limit will lead to compliance with water quality standards is largely predicated on an assumption that effluent from placer mines will undergo "a reasonable amount of

dilution" by receiving streams.[18] However, DEC Water Quality Section Chief Bayliss testified that an unspecified number of the permittees covered by DEC's blanket certification utilize most or all of the flow of a stream in their operations.[19] If a miner uses most or all of the stream in his or her operations, the record indicates that the water quality of effluent from the mine will very closely approximate the water quality of the stream below the mine because the effluent and the stream are essentially the same.[20] Therefore, if a mine's effluent contains 0.2

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[18] In its brief, TFA alludes to the fact that "[b]oth EPA and DEC regulations allow some consideration of stream mixing in determining whether a discharge from a particular site results in violations of water quality standards." *See* 18 AAC 70.032; 40 C.F.R. § 131.13. TFA also states in its brief: "While not conceding that the use of mixing zones is legal, we do not raise this argument here."

As TFA analyzes this issue, the question to be answered is whether all streams that receive placer mining discharges have sufficient flow to enable compliance with water quality standards.

[19] Bayliss also testified that using the entire stream in placer mining operations was "not typical," although he did not know how many permittees used the entire stream.

[20] TFA argues that "[i]f a miner uses all of a stream for his mining operation, then the quality downstream will equal the quality of the discharge."

DEC asserts that the use of well-maintained settling ponds installed according to DEC guidelines will ensure that permittees will comply with the settleable solids effluent limits. However, the draft NPDES permits as certified do not require permittees to use settling ponds; rather, the permits simply prohibit a permittee who decides to construct a settling pond from constructing it within a stream. Nor are the DEC settling pond guidelines (contained in a DEC publication entitled *Placer Mining Settling Pond Design Handbook* (1983)) mandatory.

ml/l of settleable solids, the maximum concentration allowed by the NPDES permits as certified by DEC, the stream below the mine will also contain roughly 0.2 ml/l of this pollutant. This substantially exceeds the water quality standard for settleable solids. The record therefore does not contain substantial evidence to support DEC's finding that reasonable dilution of placer mine effluent will enable all permittees to comply with the state water quality standard for settleable solids when the effluent limit is 0.2 ml/l. On the contrary, the record indicates that an undetermined number of miners will likely violate Alaska's settleable solids standard, even if they fully comply with the 0.2 ml/l effluent limit.

In short, TFA has met its burden of production and persuasion as to those permit holders who utilize most or all of the flow of the streams in which their mining operations take place. *See* 18 AAC 15.270(c) (burden on party requesting hearing). As to such a permit holder, DEC's certification is invalid since it will not assure compliance with Alaska's water quality standards.[21]

On the other hand, as to those permit holders whose placer mining operations do not utilize most or all of the flow of the streams used in their mining operations, we

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[21] Our task here is to ascertain whether the NPDES permits as certified meet state water quality standards for settleable solids. The foundation of our ruling is that the NPDES permit holders in question use most or the entire water flow, and that ~~under~~ the permits as certified there is no requirement that permittees use well-designed and properly constructed (in accordance with DEC guidelines) settling ponds in their operations.

hold that the record contains substantial evidence to support the Deciding Officer's thorough findings and conclusions that reasonable dilution and other relevant factors affecting the placer mines' effluent will assure compliance by permittees with Alaska's water quality standard of 0.2 ml/l for settleable solids.[22]

V. CONCLUSION.

The superior court's affirmance of the Deciding Officer's decision sustaining DEC's certification is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

Upon remand DEC shall take steps to identify those permit holders, if any, whose placer mining operations utilize most or all of a stream's flow in the course of their respective mining operations. As to any such permit holders, DEC shall take appropriate steps to withdraw its certification and vacate the permit.

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[22] We have reviewed all of the remaining specifications of errors which have been advanced by TFA, NAEC, and MAC and have concluded that they are without merit.

APPENDIX B

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

TRUSTEES FOR ALASKA; NORTHERN ALASKA ENVIRONMENTAL CENTER, Appellant, v. STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AND WILLIAM ROSS, Commissioner of the Department of Environmental Conservation, Appellee.	No. 4FA-86-1556 Civ.
MINERS ADVOCACY COUNCIL, INC., Appellant, v. STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, et al., Appellee.	No. 4FA-85-1690 Civ. (Filed JUL 31 1987)

MEMORANDUM DECISION

In this consolidated appeal, appellants seek relief from a Department of Environmental Conservation (DEC) Deciding Officer's April 14, 1986, decision upholding a .2 ml/l settleable solids effluent limitation.

The issues raised on appeal are:

1. Whether a reasonable basis exists for DEC's determination that inclusion of the .2 ml/l settleable solids effluent limit into the state's Certificate of Reasonable Assurance (CRA) is in compliance with state water quality standards. [Appellant, Trustees for Alaska (TFA) claims that DEC violated the federal Clean Water Act (CWA), 33 U.S.C. 1251 et al., and state law,

   (a) by issuing a water quality certification that failed to assure that discharge from all placer mining operations would result in compliance with water quality standards;

   (b) by failing to analysis (sic) on a site-specific basis whether discharges from individual placer mining operations will result in compliance with state water quality standards;

   (c) by basing its water quality certification for placer mining operations on factors of economic and technical feasibility.]

2. Whether DEC's inclusion of the .2 ml/l settleable solids effluent limit into the state's (CRA) constitutes a regulation requiring compliance with Alaska Administrative Procedures Act before adoption.

3. Whether DEC's failure to certify the Federal Draft National Pollution Discharge Elimination System (NPDES) permit within 60 days invalidated the state's certification.

4. Whether DEC's inclusion of the .2 ml/l settleable solids effluent limit into the (CRA) resulted from a collusive agreement between the state and environmental interests groups.

Factual Background

In order to discharge pollutants into waters of the United States, a person must obtain a National Pollution Discharge Elimination System (NPDES) permit from the Environmental Protection Agency (EPA). (33 U.S.C. 1311) This provision applies to placer miners in Alaska. EPA can not issue a final NPDES permit until the state in which the discharge originates has been given an opportunity to review the EPA draft permit to determine whether the permit's terms reasonably assure compliance with the state's water quality standards. [40 CFR Section 121.2(a)(3); Section 124.53] The state is required to made (sic) a determination whether EPA's draft permit terms are adequate to assure compliance with state water quality standards. If the state determines that EPA's draft permit terms are not adequate, the state must include in the Certificate of Reasonable Assurance (CRA) any conditions more stringent then (sic) those in the draft permit which the state finds necessary to meet state water quality standards. [40 CFR Section 124.53(e)(2)]

Under 40 CFR 124.55(c)

> A state may not condition or deny a certification on the grounds that state law allows a less stringent permit condition. The regional administrator shall disregard any such certification conditions, and shall consider those conditions or denials as waivers of certification.

Thus, a state may condition the issuance of a permit on more stringent limitations than that imposed by EPA but cannot make them less stringent.

Four hundred forty-six (446) placer miners had NPDES permits for 1984. EPA decided to modify the 1984 permits for 1985 and by a single draft permit proposed the modification for those permits and also proposed to issue similar permits to 93 placer miners who had applied for permits for 1985. On January 31, 1985, as required by 40 C.F.R. 124.53(a), EPA transmitted the single draft permit to DEC for review. (The draft permit was for 446 placer miners who had permits issued in 1984 and 93 additional placer miners who sought permits for 1985.) The draft permit contained the following effluent limitations:

a. For settleable solids – .7 ml/l monthly average, 1.5 ml/l instantaneous maximum;

b. Turbidity – 5 NTU instantaneous maximum;

c. Arsenic – 0.05 mg/l instantaneous maximum.

A joint EPA/DEC public notice was mailed to the 439 1984 permit holders and 93 permit applicants for 1985, as well as being published. The notice announced, among other things, the state's intent to consider certification of the modified draft permit pursuant to Section 401 (33 U.S.C. 1341) of the Clean Water Act (CWA). Public hearings were held by EPA on the draft permits in March of 1985. DEC presented testimony that the .7/1.5 ml/l settleable solids effluent limit was too lenient to be consistent with state water quality standards.

On approximately March 15, 1985, DEC notified Appellant, Miners Advocacy Council, Inc., (MAC) and TFA that the state was considering certification of a .2 ml/l settleable solids effluent limitation. On March 30, 1985, at the annual mining convention in Fairbanks, DEC Commissioner William Ross, in his formal address to the state's placer miners, advised that DEC intended to certify the draft permit with a .2 ml/l settleable solids effluent limitation.

DEC sent its Certificate of Reasonable Assurance (CRA) to EPA on April 29, 1985. The CRA applied both to the 446 placer miners who had permits for 1984 as well as the 93 new applicants for 1985. The CRA stated that DEC certified that there was reasonable assurance that the proposed activity was in compliance with the requirements of Section 401 of the CWA which includes the Alaska Water Quality Standards and the standards of the Alaska Coastal Management Program provided that the instantaneous maximum settleable solids effluent limitation was .2 ml/l.

EPA, after receipt of DEC's CRA notified the permit holders to include the .2 ml/l limit in their permits. No change was requested by DEC in the 5 NTU instantaneous maximum as an effluent limitation for turbidity or to the 0.05 mg/l instantaneous maximum as an effluent limitation for arsenic. Thus, the decision as to turbidity and arsenic is not a decision of DEC but of EPA.

After notification to include the .2 ml/l limit, a number of parties requested an administrative adjudication pursuant to 18 AAC 15.200. The requests were consolidated into one proceeding. Preliminarily MAC

requested a stay of the .2 ml/l limit claiming that it was a regulation and not adopted pursuant to the Alaska Administrative Procedures Act; TFA claimed the permits were invalid since the certification should have been done on a site-specific basis rather than blanketedly. Both these request were denied by the Deciding Officer.

[On May 6, 1985, appellee, MAC, filed a complaint against the state in this court challenging numerous aspects of the state's water quality enforcement scheme including the state's certification of the 1985 NPDES permits. Appellee, TFA, intervened. On May 30, 1985, MAC filed with DEC a demand for an administrative adjudication on the state's NPDES's certification. TFA and various individual miners filed similar demands. The demands were consolidated for an adjudicatory hearing which was held on February 3-6, 1986. The final decision upholding DEC's certification of the .2 ml/l settleable solids limit was issued on April 14, 1986. Both MAC and TFA have appealed from that decision. The appeals have been consolidated before this court.]

QUESTIONS ON APPEAL

I. Is the .2 ml/l settleable solids effluent limit a regulation?

MAC asserts that the .2 ml/l settleable solids effluent limit is a regulation and was not adopted pursuant to the Alaska Administrative Procedures Act.

The Deciding Officer rejected this argument by order dated November 6, 1985, and reaffirmed that decision in his April 14, 1986, decision. AS 44.62.640(a)(3) defines a regulation as:

> (3) "regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of a rule, regulation, order or standard adopted by a state agency to implement, interpret, or made specific the law enforced or administered by it, or to govern its procedure, . . . "regulation" includes "manuals," "policies, " "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, which have the effect of rules, orders, regulations or standards of general application, and this and similar phraseology shall not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public;

The label placed on a particular "statement by an administrative agency" does not determine the applicability of the Administrative Procedures Act. The statement may still be "a regulation" requiring compliance with the Alaska Administrative Procedures Act. *Kenai Pen. Fishermen's Coop. Ass'n v. State,* 628 P.2d 897, 905 (Alaska 1981). Here as in *State v. Northern Bus Co. Inc.,* 693 P.2d 319, 323 (Alaska 1984) there is a sufficient regulatory scheme to permit DEC to adjudicate all the permits. The .2 ml/l is an adjudication rather than legislation. Although the .2 ml/l applies to a number of permits, it is an adjudication; an interpretation of existing regulations rather than promulgation of a regulation. Therefore, the Deciding Officer's ruling that the .2 ml/l is not a regulation is AFFIRMED.

II. Is the .2 ml/l settleable solids effluent limit appropriate?

The state contends that there is a reasonable basis for DEC's determination that the .2 ml/l settleable solids effluent limit gives reasonable assurance of compliance with state water quality standards. TFA contend that the Deciding Officer's findings are not supported by substantial evidence and that DEC violated the federal CWA and state law by issuing a water quality certification (a) that failed to assure that discharges from all placer mining operations would result in compliance with water quality standards; (b) by failing to analyze each individual permit application on a site-specific basis; and (c) be basing its decision on factors of economic and technical feasibility. MAC contends that the certification process requires a site-by-site analyze (sic) rather than a blanket certification.

The state asserts that a reasonable basis test should be applied in reviewing the decision to include .2 ml/l while TFA claims a substantial evidence test is appropriate. The substantial evidence test is used "to review questions of fact to determine if there is an evidentiary basis to support an agency's decision on the merits of an individual case." *Galt v. Stanton,* 591 p.2d 960, 966 (Alaska 1979). The reasonable basis test is used "where there are mixed questions of fact and law involving agency expertise and/or broad policy considerations." *Jager v. State,* 537 P.2d 1100, 1107 (Alaska 1975)

The reasonable basis test, stated in another way, is that the action was not unreasonable, arbitrary or an abuse of discretion. [*North Slope Borough v. LeResche,* 581

P.2d 1112 (Alaska 1978)] The Supreme Court has also stated that the reasonable basis test is to determine that the administrative decision was not arbitrary, capricious or prompted by corruption. [*Moore v. State*, 553 P.2d 8, p.36, n.20 (Alaska 1976)]

As pointed out in *Jager v. State*, 537 P.2d 1100, 1107 (Alaska 1975):

> The reasonable basis standard permits the court to consider factors of agency expertise, policy, and efficiency in reviewing discretionary decisions. It is similar to the standard of "unreasonable, arbitrary, and capricious action" under which actions committed to agency discretion are traditionally reviewed. . . . (Footnotes omitted.)

Here, contrary to the assertion of TFA, a reasonable basis test is appropriate since the certification decision concerns mixed questions of fact and law involving overall agency expertise and policy considerations.

The court concludes that there was a reasonable basis for the administrative decision to include .2 ml/l settleable solid effluent limitation and therefore the Deciding Officer's decision upholding the .2 ml/l should be upheld.

As pointed out by DEC, practically and economically it would be impossible in any realistic way to conduct a site-by-site evaluation of each of the 539 placer miners requesting permits. Instead the agency determined that in all cases the .2 ml/l settleable solid effluent limitation would comply with the requirement that there would be no increase in concentrations above natural conditions of settleable solids.

Either or both a permit applicant or an interested group such as TFA may request a hearing on an individual permit and present evidence to persuade DEC that the .2 ml/l limitation is either too restrictive or not restrictive enough. Therefore, any interested party may have a site-specific review of any of the permits so certified.

In light of economic and practical considerations, there is a reasonable basis to have a blanket certification for all 539 permits since any interested party may come in on a site-by-site basis and request a review.

III. Did DEC inclusion of the .2 ml/l settleable solids effluent limit result from a collusive agreement between the state and interested groups?

MAC claims that the .2 ml/l limitation was an agreement between DEC and interested environmental groups, and that the decision violated the Alaska Open Meetings Act. The Deciding Officer rejected this argument, finding that there was no evidence to substantiate any such agreement. This finding by the Deciding Officer, based on his opportunity to judge the credibility of the witnesses and evidence presented, should only be reversed if clearly erroneous. *Kennedy Associates, Inc., v. Fischer*, 667 P.2d 174, 179 (Alaska 1983); *Martens v. Metzgar*, 591 P.2d 541, 544 (Alaska 1979). In reviewing the record with this in mind, the Deciding Officer's decision regarding no collusion is not clearly mistaken. Since the .2 ml/l was not the result of any agreement between DEC and environmental groups, MAC's assertion that the Alaska Public Meetings Act was violated is without merit.

IV. TFA assert that the certification of .2 ml/l for settleable solids as an effluent limitation will result in violations of water quality standards at some sites.

As stated above, there is a reasonable basis for DEC's determination that .2 ml/l will comply with state water quality standards. It was reasonable for DEC to make a blanket determination in light of the economic and practical considerations of making a site-by-site determination. As stated above, if an interest group feels that a specific location will not meet water quality standards with a .2 ml/l effluent limitation, they have the opportunity to present evidence at a hearing and persuade DEC to change the effluent limitation at a particular site.

V. Does DEC's failure to certify the Draft National Pollution Discharge Elimination System permit within 60 days invalidate their certification?

MAC claims that since DEC did not certify the NPDES permit within 60 days, the certification is void. 40 CFR 125.53(c)(3) provides that the state would be deemed to have waived its right to certify unless that right is exercised within a specified reasonable time not to exceed 60 days from the date the draft permit is mailed to the certifying state agency. The record shows that EPA transmitted the draft NPDES permit to DEC on January 31, 1985. The certificate of reasonable assurance was forwarded to EPA on April 29, 1985, approximately 90 days after EPA's submittal to the state.

The Deciding Officer concluded that the 60 day time limit had been exceeded but determined that the certification was not void. He concluded that the record did not reflect why EPA included the effluent limitation requested by the state when it was submitted to them in excess of 60 days. He speculated that EPA may have decided that it was appropriate to relax the strict time requirement in this case. Since the burden of proof is on MAC and that the record was not developed, he concluded that MAC had not met its burden and therefore upheld the certification. The state claims that MAC did not raise this below, nor in its points on appeal. However, the Deciding Officer ruled on the point and although not stated in its points on appeal, since the issue was raised below and has been briefed by the parties, the court will consider it.

This court agrees with the Deciding Officer that the 60 day violation does not make the inclusion of the .2 ml/l void. EPA saw fit to include it and apparently waived the strict 60-day requirement. The proper entity to discuss whether or not the 60 day limitation should have been waived is with EPA not the state. Until such time as EPA reverses its decision, the .2 ml/l requirement is valid and should be included in all permits.

For the reasons stated above, the decision of the Deciding Officer dated April 14, 1986, is AFFIRMED.

DATED at Fairbanks, Alaska this 31st day of July, 1987.

/s/ Jay Hodges
JAY HODGES
Superior Court Judge

APPENDIX C

BEFORE THE
ALASKA DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

In Re: 1985 NPDES Placer)
Mining Permit Certification)
_____)

DECISION

This case involves a challenge by seventy-three groups and individuals to the certification by the State of Alaska's Department of Environmental Conservation of the 1985 NPDES Placer Mining Permits. A hearing in this matter was held in Fairbanks, Alaska on February 3 - 6, 1986. The decision of the Deciding Officer follows.

I.

A. Findings of Fact

1. These proceedings arise out of a certification by the State of Alaska's Department of Environmental Conservation ("DEC") pursuant to Section 401 of the Clean Water Act of 539 permits issued to the placer mining industry in Alaska by the Environmental Protection Agency ("EPA"). The permits involved are National Pollution Discharge Elimination System ("NPDES") permits, which are issued under Section 402 of the Clean Water Act ("CWA").

2. In February of 1985 DEC received a single draft NPDES permit that EPA proposed to issue as a modified permit to each of 446 placer miners who had permits

issued in 1984 and to each of the 93 additional placer miners who sought permits in 1985.

3. The draft permit from EPA contained the following effluent limitations: for settleable solds (sic), 0.7 ml/l monthly average, 1.5 ml/l instantaneous maximum; for turbidity, 5 NTU instantaneous maximum; for arsenic, 0.05 mg/l instantaneous maximum.

4. A joint EPA/DEC public notice was mailed to each of the approximately 446 1984 permittees in late January, 1985. This notice was published beginning in February of 1985. The notice announced among other things, the state's intent to consider certification of the modified draft permit pursuant to Section 401 of the Clean Water Act.

5. A joint EPA/DEC public notice was mailed to each of the approximately 93 1985 permit applicants in February, 1985. This notice announced, among other things, the state's intent to consider certification of the 1985 draft permit pursuant to Section 401 of the CWA.

6. Public hearings were held by EPA on the draft permits in March of 1985. At these hearings DEC testified that it believed that the .7/1.5 ml/l settleable solids effluent limit in the draft permits was too lenient to be consistent with state water quality standards.

7. The state water quality standard for settleable solids is no measurable increase above natural conditions. The standard for turbidity is a level not to exceed 5 NTU above natural conditions. The standard for arsenic is a level not to exceed .05 mg/l. *See* 18 AAC 70.020; 18

AAC 80.050. There is also a provision for a "mixing zone" in the state water quality regulations. 18 AAC 70.032.

8. In a meeting on or about March 15, 1985 DEC notified the Executive Director of the Alaska Miners Association, Jim Jinks, and the Trustees for Alaska ("TFA") attorney, Eric Smith, that the state was considering certification of a .2 ml/l settleable solids effluent limitation.

9. On March 30, 1985 at the annual mining convention in Fairbanks, Alaska, DEC Commissioner William Ross, in his formal address to the State's placer miners, stated that DEC intended to certify the draft permit at a .2 ml/l settleable solids effluent limitation.

10. On approximately April 29, 1985 DEC sent its Certificate of Reasonable Assurance with a cover letter to EPA. Exhibit 23. This CRA was applicable both to the modified permits for the 446 placer mining discharges which were permitted in 1984 and also to the permits for the 93 placer mining discharges which were to be permitted in 1985. The CRA stated that public notice of the application for the certification had been made in accordance with 18 AAC 15.180. The CRA stated that DEC certified that there was reasonable assurance that the proposed activity was in compliance with the requirements of Section 401 of the CWA which includes the Alaska Water Quality Standards and the standards of the Alaska Coastal Management Program provided that the instantaneous maximum settleable solids effluent limitation was .2 ml/l.

11. At the request of the Alaska Miners Association, DEC held back delivery of the Certificate of Reasonable

Assurance ("CRA") to EPA in order to give the Association additional time to comment on the .2 ml/l effluent limit.

12. The inclusion by DEC of the .2 ml/l settleable solids effluent limit in the CRA was not the result of any agreement or collusion between DEC and any other party.

13. Following the receipt of DEC'S CRA, EPA modified the draft permits to include the .2 ml/l limit. DEC did not request in its CRA any change to the 5 NTU instantaneous maximum as an effluent limitation for turbidity or to the 0.05 mg/l instantaneous maximum as an effluent limitation for arsenic.

14. A number of parties timely filed requests for adjudication of DEC's certification pursuant to 18 AAC 05.200. These requests were consolidated into one proceeding.

15. The Deciding Officer denied a motion for stay of the .2 ml/l limit in a decision rendered in June, 1985. The Deciding Officer subsequently denied a motion by the Miners Advocacy Council ("MAC") to overturn the certification as an impermissably promulgated regulation in a decision rendered in November, 1985. The Deciding Officer also denied a motion by TFA for partial summary judgment in which TFA argued that DEC was required to perform its certification on a site-specific basis.

16. An administrative hearing was held in this matter in Fairbanks on February 3-6, 1986. At this hearing the Deciding Officer announced that he would reconsider TFA's motion for partial summary judgment. The Deciding Officer also announced that he would treat a motion

for summary judgment submitted by MAC on the issues of "review of specific forms" and "agreement" as a motion made in the context of the hearing and not as a pre-hearing motion.

17. The minimum detectable level for settleable solids using the Imhoff cone test is approximately .1 ml/l.

18. Virtually all placer miners who treat their effluent utilize settling ponds as the main treatment method.

19. To meet the permit's instantaneous maximum settleable solids effluent limitation of .2 ml/l, miners must, at a minimum, use properly designed, constructed and maintained settling ponds.

20. Properly designed, constructed and maintained settling ponds will generally produce effluent with settleable solids concentrations of less than or equal to .1 ml/l. Properly designed, constructed and maintained settling ponds will result in in-stream settleable solids concentrations of less than .1 ml/l.

21. Placer miners who meet the instantaneous maximum of .2 ml/l settleable solids effluent limit will have in-stream settleable solids levels of less than .1 ml/l.

22. The draft permit's excess water bypass and out-of-stream settling pond requirements result in reduced water usage, increased treatment efficiency and increased amount of fresh water available for in-stream dilution, thereby increasing the assurance that the mining operation will meet state water quality standards.

23. The instantaneous maximum of .2 ml/l settleable solids effluent limit is close to the minimum detectable level for settleable solids. If one takes into account

that this is an instantaneous maximum and if one makes an allowance for stream water dilution and infiltration dilution, the resultant in-steam settleable solids increase will be below the .1 ml/l minimum detectable limit.

24. Dilution ratios of effluent to receiving water of 1:1 to 1:9 are typical for Alaska placer mining operations.

25. It is reasonable to assume that there will be fresh water surface infiltration and fresh water subsurface infiltration prior to the discharge of the effluent from a settling pond into a stream.

26. Stream flow, soil characteristics, amount of paydirt moved, effluent flow and other site characteristics can vary greatly at a single site over time. In particular, stream flow and effluent flow values can vary greatly over short periods of time and throughout a mining season.

27. The accurate measurement of such matters as stream flow, effluent flow, turbidity, arsenic concentration specific gravity and other water quality parameters requires the use of complex scientific methods and equipment. For such measurements to be reasonably accurate they must be conducted by persons properly trained in water quality analysis techniques.

28. Virtually no placer miners possess or use in-stream flow gauges, effluent flow gauges, turbidometers or other equipment which is needed to accurately measure stream flow, effluent flow, turbidity, and other water quality parameters.

29. Because of the lack of expertise, training and proper equipment, the vast majority of placer miners are

unable to provide reliable data on almost any water quality or quantity parameter other than settleable solids. One cannot obtain accurate stream and effluent flow data by "eyeballing" or "guessing" the flow volume or flow ratio.

30. The NPDES permit applications, also known as the Short Form C applications, and the Tri-Agency applications are forms filled out by the miners and these forms do not contain sufficient information to permit proper site-by-site certification by DEC. Both applications lack effluent water quality information, background water quality information and meaningful stream flow and effluent flow information. The flow data provided by the miners in these two applications is based upon an "eyeball guess" and is unreliable. The data contained in the Short Form C applications and the Tri-Agency applications is not field checked for accuracy.

31. The 539 permitted mine sites are generally located in remote areas of the state, and access to the sites is often limited and expensive.

32. Virtually no verified stream flow data, effluent flow data, pollutant concentration data, or turbidity data exists for the numerous streams on which placer mining activity is permitted.

33. Development by DEC of reliable site-specific stream flow data, effluent flow data, pollutant concentration data and turbidity data would be extremely expensive and time consuming.

34. DEC does not currently have the staff and the budget to reliably certify in a timely manner 539 placer mining permits on a site-by-site basis.

35. Settleable solids, turbidity and arsenic constitute different and distinct water quality parameters. For example, settleable solids and turbidity are measured through different tests and cause different impacts on aquatic systems. Even if one lowers settleable solids levels below the minimum detectable limit, one may still have extremely high turbidity levels due to the small particles which remain suspended in the water column. The elimination of settleable solids altogether would still not assure that in-stream turbidity levels would be in compliance with state water quality standards.

II. Analysis

In this adjudication proceeding, the burden of proof and the burden of going forward with the evidence is on the requestors. *See* 18 AAC 15.270(c). For purposes of analysis there are three main categories of argument presented by the requestors in this proceeding: (1) The argument that there were deficiencies in connection with the public notice and other procedural items related to the state's certification decision in this matter; (2) the argument that the State's certification decision was the product of an "agreement" between the State and environmental groups and thus void; and (3) the argument that the effluent limit of .2 ml/l for settleable solids was improperly arrived at and will not assure compliance with state water quality standards. Each of these three categories of argument is discussed below.

A. *Procedural Issues*

1. *Procedural requirements for a "regulation"*

MAC has earlier argued in the course of these proceedings that the .2 ml/l effluent limit for settleable solids which was certified by the state was really a regulation. MAC has argued that, since the .2 ml/l effluent limit was a regulation, the limit was invalid because DEC did not comply with the procedural requirements set forth in the statutes for the enactment of a regulation.

In an order dated November 6, 1985 the Deciding Officer rejected MAC's argument and concluded that the effluent limit was not a regulation but rather part of a certification action by the state. That earlier order is confirmed by the Deciding Officer.

2. *Public Notice*

Several requestors have argued that the State did not give proper notice to the 1984 NPDES permittees that the state intended to certify the 1985 modified draft permits on anything other than the revised turbidity and arsenic effluent limitations proposed by EPA. The requestors also argue that the state lacked the legal authority to certify the modified 1985 draft NPDES permits at all because the state had earlier waived certification of the 1984 draft NPDES permits. Alternatively, it is argued that the state could at most certify the limitations for turbidity and arsenic which had been modified by EPA. The Deciding Officer rejects these arguments.

The requirements for public notice by the state in certification actions are set forth in 18 AAC 15.140. That

regulation provides that public notice of the certification application will be published jointly with notice of proposed action by EPA.

The joint EPA/DEC notice with regard to the 1985 modified draft permits was published and it stated as follows:

> *State Certification*. This notice will also serve as Public Notice of the Intent of the State of Alaska, Department of Environmental Conservation to consider certifying that the subject discharges will comply with the applicable provisions of Sections 208(e), 301, 302, 303, 306 and 307 of the Clean Water Act. The NPDES permits will no [sic] be issued until the certification requirements of Section 401 have been met.

Exhibit 20, p.2. The notice also set forth a 30 day period for comments by the public on the topic of state certification and provided an address for the sending of such comments.

Nothing in the public notice indicates that the state intended to certify compliance of the discharges only with the arsenic and turbidity water quality standards. By its very terms the notice declares that the state intended to conduct a CWA § 401 certification. Such a certification means that the state must evaluate whether or not the modified draft permits from EPA reasonably assure that there will be compliance with all applicable state water quality standards.

The public notice thus complied with the requirements of 18 AAC 15.140 and gave legal notice of the state certification action with regard to the modified permits. It should also be noted that there was, in addition to the

legal notice, abundant actual notice to the mining community that the state intended to review for certification purposes the entire modified draft permit and not just the modified turbidity and arsenic limitations.

The requestors next argue that, even if the state complied with the public notice requirements for its certification action, the state was barred from reviewing all or part of the modified draft permits because it had earlier waived certification of the 1984 draft permits. The requestors do not cite any supporting authority for this argument.

The CWA states that EPA must provide the state an opportunity to grant, waive, or deny certification of any draft NPDES permit. There is no provision that states that if EPA submits a modified draft permit to the state for certification, that the state cannot review the permit if it earlier waived certification or that it can review only the modified portion of the draft permit for certification purposes. When the state received the modified draft permits in 1985, it was obligated to perform its certification function based on the information it had available to it in 1985. The state's earlier action in 1984 did not constitute a bar or a waiver to its taking such certification action in 1985.

3. *Public Hearing*

One requestor, Kenneth Manning, has argued that DEC was required to have an additional public hearing. His argument is that AS 46.03.070 requires a public hearing before DEC may adopt pollution standards. Since the effluent limitation of .2 ml/l for settleable solids is a

"standard", argues Mr. Manning, DEC should have held a public hearing on this proposed "standard." The Deciding Officer rejects this argument.

In the first place, the effluent limitation of .2 ml/l which was certified by DEC for settleable solids was not a "standard" as that term is used in AS 46.03.070. The .2 ml/l effluent limitation was a limitation for these particular NPDES permits only. The limitation was not a pollution standard generally applicable to all the waters of the state.

No special hearing was required under state or federal law to review the certification of the draft NPDES permits by the State. There was the joint EPA/DEC public hearing that was in part a public hearing on the state certification issue. Once the state formulated its certification decision, however, it was not necessary that the state then have a public hearing to discuss this formulated decision. Such an extra layer of hearings in the event that state makes any changes to the limitations in the EPA's draft permit is simply not required by law. A permittee can provide input to the state certification process at the joint public hearing. A permittee can also request an adjudicatory hearing from the state after the receipt of his permit. There is no requirement that the state afford an additional hearing at the time that it is proposing to certify a different effluent limit from that included by EPA in its draft permit.

4. *Timeliness of Certification*

One requestor, Ron Rosander, has argued that the state's failure to certify the draft 1985 NPDES permits in a

timely manner constitutes a waiver of its right to certify. His argument is as follows. The state was given a 60 day time period by EPA for certification. The state was told by EPA that it would be deemed to have waived its right to certify unless the certification right was exercised within 60 days of receipt of the EPA letter which accompanied the draft permits. The state transmitted its Certificate of Reasonable Assurance to EPA on or about April 29, 1985. This date was more than 60 days after the state received the draft permits from EPA, and so the state should be held to have waived its certification right. The Deciding Officer rejects this argument.

The state did in fact apparently communicate its decision to EPA about certification more than 60 days after its receipt of the draft permits. EPA incorporated the revised effluent limitation from the state's certification into the final NPDES permits for 1985. There was no testimony or other evidence as to why EPA acted as it did in this matter. EPA may have decided that it was appropriate to relax the strict time requirement in this case. The party with the burden of proof clearly has the responsibility to develop the record in this regard, and such development was not done.

This argument is really one which would more appropriately be made to the EPA than to the state. Mr. Rosander is arguing that EPA should not have acted as it did in agreeing to modify the permits. A challenge to the appropriateness of EPA's action should be brought before that federal agency. The Deciding Officer is not in a position to review the appropriateness of EPA's actions in this matter, even if there were sufficient evidence on this point in the record.

The certificate of reasonable assurance issued by the state is not rendered void by the timeliness argument.

5. *Specific References in Certification*

One requestor, Ron Rosander, has argued that the State's failure to cite specific CWA or state law references in connection with its change in the effluent limitation for settleable solids renders the state certification void. The argument is as follows. Federal regulations require that state certification be in writing and, where more stringent than the conditions in the EPA draft permit, that the certification cite the CWA or state law references upon which that condition is based. Since the state did not cite the CWA or state law references, argues Mr. Rosander, the certification action by the state is void. The Deciding Officer rejects this argument.

The Certificate of Reasonable Assurance ("CRA") submitted to EPA by DEC states as follows:

> Having reviewed the application an (sic) comments received in response to the public notice, the Alaska Department of Environmental Conservation certifies that there is no reasonable assurance that the proposed activity, as well as any discharge which may result, is in compliance with the requirements of *Section 401 of the Clean Water Act which includes the Alaska Water Quality Standards, 18 AAC 70, and the standards of the Alaska Coastal Management Program, 6 AAC 80, provided that the instantaneous maximum settleable solids effluent limitation be 0.2 milliters per liter.* (emphasis added)

The cover letter from DEC which accompanied the CRA set forth at page 2 the citation of 18 AAC 70.020(b)

and noted the requirement that there be "no measurable increase in concentrations of sediment above natural conditions." *See* Exhibit 23.

The Deciding Officer concludes that the state certification did cite the relevant C.W.A. or state law references upon which the .2 ml/l effluent limitation was based. Moreover, this argument again is one which is more appropriately made to EPA than to the state since it involves an allegation that EPA should not have changed the effluent limitation for settleable solids in the permits upon receipt of the state's certificate of reasonable assurance. The fact is that EPA did modify the permits. If a requestor believes that EPA acted improperly, then such an argument should be raised before EPA.

B. *The Agreement Argument*

One of the requestors, MAC, has argued that DEC entered into an agreement with various environmental groups to certify the effluent limit for settleable solids at .2 ml/l, and that such an agreement constitutes an abuse of discretion and invalidates the certification decision by the State. The Deciding Officer rejects this argument.

The evidence in this proceeding indicates that the inclusion of the .2 ml/l settleable solids effluent limitation into the CRA was not the result of any agreement between the State and various interest groups. The requestors have not produced credible evidence that any such agreement existed. The testimony of Randolph Bayliss and Randall Rodgers establishes that there was not any such agreement.

It is not at all clear that the effluent limitation of .2 ml/l for settleable solids would be subject to successful attack even if it were shown to be the product of an agreement between the State and certain parties. There would still seem to be the fundamental question as to whether the limitation was an appropriate and reasonable one. It is unnecessary for the Deciding Officer to reach this question, however, because MAC has not sustained its burden of proof with regard to establishing the proposition that the effluent limitation for settleable solids was reached as the result of an agreement between DEC and environmental groups.

C. *.2 ml/l As An Effluent Limitation*

1. *Did DEC Consider Improper Factors in Certifying the NPDES Permits?*

The argument has been made that DEC based its certification decision on the economic and physical attainability of the .2 ml/l effluent limitation for settleable solids, and that such a basis for its decision was improper. The Deciding Officer concludes that DEC did not base its certification decision on the economic and physical attainability of the effluent limit.

The testimony of Randolph Bayliss was that the economic and physical attainability of the .2 ml/l effluent limitation was not the basis for certification by DEC. Transcript, Vol. 3, p. 252-253. This testimony is both credible and persuasive.

TFA has argued that the cover letter to EPA which accompanied DEC's CRA discussed the physical and economic attainability of the .2 ml/l effluent limitation, and

that this portion of the letter gives the actual rationale for the certification decision by DEC. This argument is not supported by the factual evidence in the case. The evidence indicates that the comments in DEC's cover letter which pertained to physical and economic attainability were included as a matter of general or incidental interest. The .2 ml/l effluent limitation was, in the opinion of DEC, needed to provide reasonable assurance of compliance with water quality standards.

2. *Site-Specific Analysis*

A number of the requestors have argued that certification of a permit for placer mining must be made on a site-specific basis. Since there was no site-specific analysis underlying the state's certification in this matter, the requestors argue that the certification is invalid. The Deciding Officer rejected this argument when it was submitted as a motion for partial summary judgment prior to the hearing in this case, and the Deciding Officer again rejects the argument.

There is no requirement in either federal or state law that DEC perform a site-by-site evaluation of each placer mining operation in the state before any certification takes place. While a site-by-site analysis is certainly not precluded by law, it is not the only valid approach which DEC could follow in the certification process.

It is relevant in evaluating the site-specific proposal to note that such a certification process would be, in practical terms, extremely difficult if not impossible to perform. DEC does not possess the necessary site-specific information, nor the staff to gather such information for

the 539 placer mining sites in the state. It is not a viable option to require a site-by-site analysis based on information supplied by the individual placer miners. The Deciding Officer is convinced by the evidence presented at the hearing that such information would for the most part be "guesses" by the individual miners and thus inherently unreliable. To require meaningful site-specific analysis by DEC prior to certification would mean that DEC would either have to waive certification or obtain a lengthy extension of time from EPA within which to make the certification decision.

The Deciding Officer is convinced that a meaningful certification decision can be made by DEC without a site-specific analysis of each mining site. If DEC can give a reasonable assurance that an activity will be conducted in a manner which will not violate water quality standards, then a proper certification has been performed. Whether the actual approach used by DEC satisfies the requirements of reasonable assurance is discussed *infra* in Section C(4).

3. *Review of NPDES Permit Applications and Tri-Agency Forms*

An argument is made by the requestors that the failure of DEC to review the NPDES permit applications and the state Tri-Agency forms renders DEC's certification decision invalid. The argument seems to be that these forms had meaningful site-specific information which would allow DEC to perform a site-by-site analysis, and that for DEC to fail to review such information

renders its certification decision invalid. The Deciding Officer does not think this argument has merit.

The NPDES permit application, which is also known as the "Short Form C", and the Tri-Agency form do not provide sufficient meaningful information to allow DEC to perform a site-specific analysis. The Short Form C is filled out by the miner and the accuracy of the information on the form is questionable. The data is not field-checked for accuracy, and the data does not provide sufficient information to calculate water quality. The information on the Tri-Agency form is no more helpful or reliable.

The Deciding Officer has already determined that a site specific analysis is not required before the DEC's certification action. There is no valid reason why a certification decision should be invalid simply because DEC did not review two general forms which had been submitted by the miner. Certainly, the failure to review general forms does not by itself render a certification decision arbitrary or capricious.

4. *Reasonableness of .2 ml/l as an Effluent Limitation for Settleable Solids*

An argument has been made that an effluent limitation of .2 ml/l for settleable solids will not provide reasonable assurance of compliance with water quality standards. The Deciding Officer does not think that any requestor has sustained its burden of proof on this issue, and consequently this argument is rejected.

The evidence indicates that, to meet the permit's .2 ml/l limit, a miner must use a properly designed, constructed and maintained settling pond. The evidence also indicates that such a settling pond will produce effluent with settleable solids concentrations of .1 ml/l or less. Furthermore, a placer miner who meets the .2 ml/l settleable solids effluent limit will have in-stream settleable solids levels of less than .1 ml/l, which is the minimum detectable limit. Such a level of settleable solids clearly satisfies the state water quality standard of "no measurable increase."

The .2 ml/l effluent limitation is very close to the minimum detectable level for settleable solids. If one takes into account the excess water bypass provision in the draft permit as well as the out-of-stream settling pond requirement, the .2 ml/l limitation is a reasonable limitation. If one further takes into account in-stream dilution and increased treatment efficiency, the .2 ml/l limitation becomes even more reasonable as a limitation which will assure compliance with water quality standards.

One can make additional observations about the appropriateness of the .2 ml/l limitation. There will be some infiltration dilution in placer mining operations. Furthermore, the .2 ml/l limitation is an instantaneous maximum. That is, the effluent can never exceed .2 ml/l at any time during the operation of a mining site. It is reasonable to assume that the effluent quality for settleable solids will generally be below .2 ml/l rather than right at .2 ml/l.

When these assumptions are made, and the evidence presented at the hearing indicates that these assumptions

are in fact reasonable ones, the .2 ml/l effluent limitation for settleable solids clearly is a reasonable one. The evidence indicates that DEC is able to say with confidence that such a limitation will reasonably assure compliance with water quality standards.

TFA has argued that if one does not do a site-specific verification for settleable solids in effluent, then only an effluent limit of .1 ml/l will assure compliance with water quality standards. The assumptions underlying such an approach are not reasonable. While .1 ml/l will by definition assure that in every case there is no measurable increase in settleable solids concentrations above natural background, it is not necessary for the limitation to be that low to reasonably assure no measurable increase. TFA's argument assumes a worst case scenario in every case and ignores some reasonable assumptions about dilution, pond performance, and instantaneous maximums. The evidence presented at the hearing indicates that TFA's argument is not correct when applied to the real world and actual mining sites.

Dilution, instantaneous maximum considerations, actual performance of settling ponds – all these factors help to insure that the .2 ml/l limitation will assure compliance with the water quality standards. TFA has argued that if the effluent limitation is not at .1 ml/l or lower, then it is possible under some circumstances that there will be a violation of water quality standards. The Deciding Officer does not interpret the CRA to mean that DEC has assured that there will never be an incident where a discharge from a placer mining site in the state increases the settleable solids concentration in a stream. The CRA must be more reasonably interpreted. Can DEC

certify that a limitation reasonably assures compliance with state water quality standards? If so, then the test is met. The evidence presented in this case indicates that DEC can satisfy this test with the .2 ml/l limitation.

5. *Turbidity and Arsenic*

TFA has argued that DEC's certification of .2 ml/l as an effluent limitation for settleable solids will not assure compliance with water quality standards for turbidity and arsenic. The Deciding Officer disagrees.

The draft permits received by DEC from EPA had separate effluent limitations for turbidity and arsenic. These effluent limitations were the same as the state water quality standards for these items, and so by definition the limitations will assure compliance with the water quality standards. Settleable solids and turbidity constitute different and distinct water quality standards. The same is also true of arsenic. Even if one were to lower settleable solids levels to below the minimum detectable limit, one could still have turbidity levels or arsenic levels above the allowable levels. But if one satisfies all the effluent limitations in the permit which DEC certified, then one will also satisfy all the applicable state water quality standards.

TFA really is arguing that the enforcement policy of DEC indicates that it intends to enforce the settleable solids limitation but not the turbidity or arsenic limitations in the permits. This argument, even if true, is simply not relevant to the present proceeding. The limitations for settleable solids, turbidity and arsenic are

not inherently contradictory. The certification action by DEC reasonably assures compliance with water quality standards. What DEC does by way of enforcement of water quality standards or effluent limitations is not relevant to a proceeding concerned with the appropriateness of a certification decision.

The requestors have not raised any other substantive challenges to the certification action by the state. Consequently, the Deciding Officer determines that the state's certification action was proper and in compliance with the applicable laws and regulations.

DATED this 14th day of April, 1986, at Anchorage, Alaska.

/s/ Mark E. Ashburn
Mark E. Ashburn
Deciding Officer

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF ALASKA

MINERS ADVOCACY COUNCIL, INC., Appellant, v. STATE OF ALASKA, et al., Appellees.	Supreme Court No. S-2369
	ORDER
TRUSTEES FOR ALASKA, et al., Appellants, v. STATE OF ALASKA, et al., Appellees.	Supreme Court No. S-2370
	(Filed Sept 21, 1989)

Trial Court No. 4FA 86-1556 Civil

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton and Moore, Justices.

The court entered an order on September 7, 1989, denying the petition for rehearing on behalf on Miners Advocacy Council, Inc. as to all issues concerning the state's certification of a settleable solids effluent limitation. The Court took the issue of who was the prevailing party in these cases under advisement.

IT IS ORDERED:

The petition for rehearing is denied as to the issue of who was the prevailing party in these cases.

Entered by direction of the court at Anchorage, Alaska on September 15, 1989.

/s/ David A. Lampen
DAVID A. LAMPEN
Clerk of the Supreme Court

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF ALASKA

MINERS ADVOCACY COUNCIL, INC., Appellant, v. STATE OF ALASKA, et al., Appellees.	)	Supreme Court No. S-2369
	)	*ORDER*
TRUSTEES FOR ALASKA, et al., Appellants, v. STATE OF ALASKA, et al., Appellees.	)	Supreme Court No. S-2370

Trial Court No. 4FA 86-1556 Civil

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton and Moore, Justices.

On consideration of the petition for rehearing, filed by the appellant Miners Advocacy Council, Inc. on August 7, 1989,

IT IS ORDERED:

1. The petition for rehearing is denied as to all issues concerning the state's certification of a settleable solids effluent limitation.

2. The issue of who was the prevailing party in these cases is taken under advisement. It will be decided in connection with the pending motions concerning the award of attorney's fees.

Entered by direction of the court at Anchorage, Alaska on September 5, 1989.

/s/ David A. Lampen
DAVID A. LAMPEN
Clerk of the Supreme Court

APPENDIX F

IN THE SUPREME COURT FOR THE STATE OF ALASKA

MINERS ADVOCACY COUNCIL, INC. Appellant, v. STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; TRUSTEES FOR ALASKA; and NORTHERN ALASKA ENVIRONMENTAL CENTER, Appellees.	Supreme Court No. S-2369 4FA-85-1690 Civil
TRUSTEES FOR ALASKA and NORTHERN ALASKA ENVIRONMENTAL CENTER, Appellants, v. STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION; DENNIS D. KELSO, Commissioner of the Department of Environmental Conservation; and MINERS ADVOCACY COUNCIL, INC., Appellees.	Supreme Court No. S-2370 4FA-86-1556 Civil

PETITION FOR REHEARING

COMES NOW Miners Advocacy Council (MAC) and hereby petitions this Court for rehearing concerning its Opinion No. 3473, dated Friday, July 28, 1989. MAC bases its petition on Appellate Rule 506(a)(3), that the Court has overlooked or misconceived a material fact and proposition of law.

In particular, MAC requests that the Court grant rehearing concerning that portion of its Opinion, pages 5 and 16-19, where the Court discusses the State's certification of a settleable solids effluent limitation, and of the Court's determination of the prevailing parties.

I. *REGULATION NOT EFFECTIVE ON DATE OF CERTIFICATION*

The Court based its Opinion on 18 AAC 70.020, Alaska Water Quality Standards (WQS) which *presently* state in relevant part:

> No increase in concentrations of sediment, including settleable solids, above natural conditions.

See Opinion at 5, 18. However, at the time of the State's certification on April 29, 1985, 18 AAC 70.020 did *not* contain the phrase "including settleable solids." Instead, nearly two months subsequent to the certification, 18 AAC 70.020 was amended, effective June 23, 1985, to contain the phrase "including settleable solids." *See* Exhibit A; Exhibit B at 3-4.

It cannot be argued that "sediment" and "settleable solids" are the same. Otherwise, the State would not have

found it necessary to amend its regulations to provide for a "settleable solids" requirement. *See Janes v. Otis Engineering Corp.*, 747 P.2d 50, 54 (Alaska 1988). Accordingly, the State's certification was not based upon "appropriate requirements of State law" as required by 40 C.F.R. 124.53; it was not based upon any State law at all. It is plain error.

II. *0.2 ML/L AS A "REGULATION" IS NOT MOOT*

This Court found that "the 0.2 ml/1 limit was attributable to action by DEC, and this action was arguably regulatory in nature." Opinion at 18. The Court then found that MAC's claim that DEC violated Alaska's Administrative Procedure Act when it adopted a *de facto* regulation was moot, and discussed none of MAC's authority. *Id.* at 19. For the following reasons, MAC does not agree that this action is moot.

A. *Ongoing Enforcement Actions*

In 1986, EPA filed 13 enforcement actions in Federal District Court. At least one of these enforcement actions was based almost entirely upon the change in settleable solids from the .7/1.5 ml/l in the 1984 permit prior to modification, to the 0.2 ml/l in the 1985 modified permits as a result of State certification. This enforcement action is still pending. *See* Exhibit B at 2-3; Exhibit C at 3. Because an enforcement action is still pending, based almost entirely upon the issue of whether or not the 0.2 ml/1 was correctly incorporated into the permit in 1985, this issue clearly cannot be moot.

B. *Ongoing EPA Proceedings*

MAC and several individual placer miners are currently challenging the 1985 permits in proceedings before the EPA. Most recently, an evidentiary hearing was held in April 1989, and post-hearing briefs are now being prepared. *See* Exhibit B at 3; Exhibit D. In these proceedings, EPA has the ability to modify the State-certified terms, but any such modification is directly contingent on this Court's ruling on the merits of the "regulation" issue. *See Roosevelt Campobello International Park Commission v. U.S.E.P.A.*, 684 F.2d 1044, 1056 (1st Cir. 1982); MAC's Reply Brief at 30-31. For this reason also, the issue is not moot.

C. *Capable of Repetition Yet Evading Review*

The Court has recognized that an issue is not moot where it is capable of repetition yet evading review. *See Etheridge v. Bradley*, 502 P.2d 146, 153 (Alaska 1972). This is just such a case. As the Court recognized, the way the certification process works, DEC may insert a term in all the permits the first time and it is action attributable to DEC. *See* Opinion at 18-19. The next time around, however, EPA will insert the term itself and it will not be DEC doings, but EPA action, not subject to the Alaska APA. *Id.* By the time any challenge to the initial DEC action reaches this Court, EPA will have issued a subsequent permit and the DEC's "regulation" will have once again evaded this Court's review; a proverbial game of legal hot potato.

D. *For Determining the Prevailing Party*

The Court has recognized that it will render a decision on an otherwise moot issue for the purpose of determining who is the prevailing party in a given litigation. *LaMoureaux v. Totem Ocean Trailer Express, Inc.*, 651 P.2d 839, 840 n.1 (Alaska 1982). The "regulation" issue has been MAC's first and foremost point of contention from the very beginning of this case in 1985, and considerable costs and attorney's fees have been expended on this and other aspects of the case. Had the "regulation" issue been properly decided on the merits, MAC would have been the "prevailing party" entitled to its costs and attorney's fees under Rule 82. At the very least, MAC is entitled to a decision on the merits from this Court.

IV. *MAC PREVAILED ON "SITE-SPECIFIC" ISSUE*

MAC specifies as a second basis for rehearing, that MAC was a prevailing party on this appeal. Although MAC spent a substantial portion of its brief challenging the regulation process allegedly utilized by the DEC for its blanket certifications, the fact of the matter is that MAC also sought in its briefing that the Supreme Court order the Department of Environmental Conservation to proceed to site-specific analyses of the various permits to assure reasonable water quality standards were met. *See e.g.* MAC's Brief of Appellant at 16-18, 21. Although the Supreme Court dismissed MAC's arguments out of hand, without discussing specific cases which were cited, MAC would like to point out that when this Court ordered DEC to proceed to evaluate the various streams on a site-specific basis with respect to stream usage, MAC did, in

effect, prevail in the portion of its argument seeking site-specific review. *See* Opinion at 30-33. The only difference is that the Court accepted the argument of the Trustees for Alaska that the water restrictions should be stricter, as opposed to more lenient. Yet the site-specific portion of MAC's request was granted and, to that effect, both MAC and the Trustees for Alaska prevailed on that specific argument.

WHEREFORE, MAC respectfully prays that the Court grant MAC's Petition for Rehearing and hold that the DEC's 1985 certification was contrary to law and grant relief as set forth in this petition and MAC's briefs in this case.

DATED this 7th day of August, 1989, at Fairbanks, Alaska.

THE LAW OFFICES OF WILLIAM R. SATTERBERG, JR.

By /s/ William R. Satterberg, Jr.
William R. Satterberg, Jr.
Attorney for MAC
Robert John, Legal Intern

:mjo

EXHIBIT A

ORDER AMENDING REGULATIONS OF DEPARTMENT OF ENVIRONMENTAL CONSERVATION

The attached two pages of regulations, dealing with State Water Quality Standards, are hereby adopted and certified to be correct copies of the regulations which the Department of Environmental Conservation amends

under authority vested by AS 46.03 and after compliance with the Administrative Procedure Act (AS 44.62), specifically including notice under AS 44.62.190 and 44.62.200 and opportunity for public comment under AS 44.62.210.

This action is not expected to require an increased appropriation.

This order takes effect on the 30th day after it has been filed by the Lieutenant Governor as provided in AS 44.62.180.

Date: April 19, 1985
Juneau, Alaska

/s/ Bill Ross
Bill Ross
Commissioner
Department of Environmental Conservation

FILING CERTIFICATION

I, Norman Gorsuch for Stephen McAlpine, Lieutenant Governor for the State of Alaska, certify that on May 24, 1985, at 11:00 a.m., I filed the attached regulations according to the provisions of AS 44.62.040 – 44.62.120.

/s/ Norman Gorsuch
For Lieutenant Governor

Effective June 23, 1985.
Register 94, July 1985

Register 94, July 1985 18 AAC 70.020

ENVIRONMENTAL CONSERVATION

18 AAC 70.020(b)(1)(A)(i)(7), the water quality criterion for sediment associated with drinking, culinary, and food processing uses of fresh water, is amended to read as follows:

No increase is concentrations of sediment, including settleable solids, above natural conditions (See Note 18).

18 AAC 70.020(b)(1)(B)(i)(7), the water quality criterion for sediment associated with contact recreation uses of fresh water, is amended to read as follows:

No increase in concentrations of sediment, including settleable solids, above natural conditions (See Note 18).

The Notes section of 18 AAC 70.020 is amended by adding the following Note immediately following Note 17:

18. Volumetric measurements of settleable solids, must be determined according to the following procedure: fill an Imhoff cone to the one-liter mark with a thoroughly mixed sample. Settle for 45 minutes; gently stir sides of cone with a rod or by spinning; settle 15 minutes longer, and record volume of settleable matter in the cone as milliliters per liter. If the settled matter contains pockets of liquid between large settled particles, estimate volume of these and subtract from volume of settled matter. (In effect before 7/28/59; am 5/24/70, Reg. 34; am 8/28/71, Reg. 39; am 10/22/72, Reg. 44; am 8/12/73, Reg. 47; am 2/2/79, Reg. 69; am 4/23/79, Reg. 70; am 9/19/79, Reg. 71; am 12/19/82, Reg. 84; am 6/23/85, Register 94)

Authority: AS 46.03.020
AS 46.03.070
AS 46.03.080
AS 46.03.750(e)

EXIBIT B

IN THE SUPREME COURT FOR
THE STATE OF ALASKA

MINERS ADVOCACY COUNCIL, INC.,

Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, et al,

Appellee.

TRUSTEES FOR ALASKA; NORTHERN ALASKA ENVIRONMENTAL CENTER,

Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and DENNIS KELSO, Commissioner of the Department of Environmental Conservation, and MINERS ADVOCACY COUNCIL, INC.,

Appellees.

Supreme Court No. S 2369 & S2370
(Superior Court No. 4FA-86-1556 Civil)
(Consolidated with 4FA-86-1690 Civil)

AFFIDAVIT OF ROSALIE A. RYBACHEK

ROSALIE A. RYBACHEK, upon oath, deposes and says:

I am a placer miner, former president of the Alaska Miners Association, currently secretary of the Miners Advocacy Council, and have knowledge of the facts contained herein:

1. My husband and myself have been placer mining on Wilbur Creek, a tributary of the Tolovana River, since 1961.

2. In 1984, we were issued a NPDES permit for our operation which contained the end-of-pipe effluent limitation for settleable solids of 0.7 ml/l monthly average and 1.5 ml/l daily high. The State of Alaska waived certification on that permit.

3. On January 31, 1985, we were notified that our permit would be modified for turbidity and arsenic. Because turbidity and arsenic were the only conditions being modified, we did not comment on any other permit condition.

4. On April 29, 1985, the State of Alaska Department of Environmental Conservation certified our permit for a more stringent settleable solids effluent limitation of 0.2 ml/l, instead of the 0.7 ml/l and 1.5 ml/l contained in our 1984-86 permit.

5. In 1986, EPA filed suit in Federal District Court, against 13 miners, including my husband and myself. (*See* Exhibit C at 3). This complaint, (*EPA v. Rybachek*, F-86-59 Civil) charged us with numerous violations of our 1985

permit conditions. Although the Complaint did not specify the number of alleged violations, through discovery we were able to determine that there were a total of 14 alleged violations. Thirteen of these alleged violations met instream water quality standards, but were over the 0.2 ml/l end-of-pipe effluent limitation incorporated into our modified 1985 permit as a result of state certification. The final alleged violation was covered by the report of an upset, pursuant to provisions of our NPDES permit, and other factors.

6. This case is still pending in Federal District Court. It is my belief that the decision as to whether or not the State of Alaska followed its procedures regarding a regulation (which allows for public comment prior to the taking of property) will have a major impact upon the decision in that case.

7. In addition, the Miners Advocacy Council and others challenged the issuance of the modified NPDES in 1985 through the request for an evidentiary hearing with the Environmental Protection Agency.

8. That evidentiary hearing was held in April, 1989. Presently, post-hearing briefs are due August 25, 1989, before EPA's Administrative Law Judge. (*See* Exhibit D).

9. I was asked by the Miners Advocacy Council to assist in preparing testimony for this hearing. While doing research, I obtained a copy of the permanent regulation record, kept in the offices of the Lieutenant Governor for the State of Alaska. (*See* Exhibit A).

10. This record showed that the regulation promulgated by the Alaska Department of Environmental Conservation which inserted the phrase "including settleable solids" into the water qualify standards did not become effective until June 23, 1985.

11. To the best of my knowledge, this is the first time that anyone within the mining community was aware of the effective date of that regulation. However, I know that the officials of the Department of Environmental Conservation were aware that the regulation was not effective at the time they certified the 446 modified permits and 93 new permits issued in 1985, for a more stringent settleable solids limitation.

Further affiant sayeth not.

DATED IN Fairbanks, Alaska this 7th day of August, 1989.

/s/ Rosalie Rybachek
Rosalie Rybachek

/s/ Elizabeth Starkey Swenson
Notary Public in and for
Alaska
My Commission expires
6-1-92

EXHIBIT C

ALASKA ENFORCEMENT ACTIONS – Placer Mining

Compliance Orders

Name	Permit No.	Docket No.	Issuance Date
Awe, Charles J. Jr.	AK0029378	1085-07-51-309A	07/25/85
Awe, Charles J. Jr.	AK0029360	1085-07-50-309A	07/25/85
Awe Charles J. Jr.,	AK0041921	1085-07-52-309A	07/25/85
Brandl, Philip	AK0025011	1085-06-48-309	06/28/85
Guthrie, Paul	AK0042102	1085-08-04-309A	08/05/85
Hasson, Peter	AK0027812	1085-07-34-309A	07/16/85
Herzog, Martin & Jean	AK0028576	1085-06-46-309	06/28/85
Johnson, Al	AK0025321	1085-07-29-309A	07/16/85
Koppenberg, Sam	AK0028541	1085-06-53-309	06/28/85
Miknich, Charles	AK0046731	1085-07-49-309A	07/25/85
Schmuck, Arthur J.	AK0030805	1085-06-49-309	06/28/85
Soule, Harold	AK0027979	1085-06-47-309	06/28/85
Wheeler, James P.	AK0036455	1085-08-36-309	08/19/85
Referrals			
Birdsell, Russell	AK0035696	1085-11-07-301	03/12/86
Cacy, Robert	AK0038075	1085-09-22-301	01/08/86

Cuevas, Daniel	No permit	1085-11-06-301	03/13/86
Dale, Jim	No permit	1084-09-07-301J	12/27/84
Harling, Victor	AK0041408	1085-12-02-301	03/12/86
McIntosh, Richard	AK0042226	1085-11-05-301	07/07/86
Munsell, James L.	AK0036374	1085-11-05-301	01/08/86
Olson, Richard	AK0035548	1086-04-10-309	07/07/86
Pavey, M.A.	AK0041084	1085-11-03-309	07/07/86
Robertson, Juan	No permit	1085-11-02-301	03/10/86
Rybachek, Stanley C.	AK0029131	1085-09-24-301	01/08/86
Three Channel Mining	No permit	1085-09-15-301	01/08/86
Weber, Stephen R.	AK0041050	1085-09-28-301	01/08/86
Word, J.B.	AK0042471	1085-11-04-301	07/07/86

EXIBIT D

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

IN THE MATTER OF 539 Alaska Placer Miners, More or Less, and 415 Alaska Placer Miners, More or Less,	Docket No. 1085-06-14-402C and 1087-08-03-402C REVISED POST HEARING ORDER

EPA Region 10 having moved for a 30 day extension of time for the filing of post hearing briefs in this matter

based upon the need to correct errors and eliminate omissions in the hearing transcript, the following revised briefing schedule is established:

1. On or before July 12, 1989, EPA shall submit an errata correcting what it believes are errors in the transcript of the testimony given the EPA witnesses at the evidentiary hearing held in this matter on April 24 and 25, 1989.

2. On or before August 11, 1989, any party in disagreement with the errata filed by EPA shall file a memorandum setting forth the basis of disagreement.

3. Initial proposed findings of fact, conclusions of law, and supporting briefs shall be filed no later than August 25, 1989.

4. Reply briefs shall be filed no later than October 10, 1989.

/s/ T. B. Yost
Thomas B. Yost
Administrative Law Judge

Date: 6/23/89

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing was served on the Regional Hearing Clerk, Region X service by first class U.S. mail. The Hearing Clerk is hereby requested to copy and distribute the foregoing to all parties to these proceedings.

/s/ Marsh P. Dryden 6/27/89
Marsha P. Dryden
Legal Technician

HONORABLE THOMAS B. YOST
U.S. ENVIRONMENTAL PROTECTION AGENCY
345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

404/347-2681, Comm. 257-2681, FTS

CERTIFICATE OF SERVICE

IN THE MATTER OF:	)	Docket Nos.
539 Alaska Placer Miners, More or Less, and	)	1085-06-14-402C & 1087-08-03-402C
415 Alaska Placer Miners, More or Less.	)	

I, Marian L. Atkinson, Region 10 Hearings Clerk, do hereby swear that on July 5, 1989, I forwarded a copy of a Revised Post-Hearing Order in the above-entitled matter by regular first class mail, postage prepaid, to the following individuals:

D.M. Ackels
1725 Roosevelt Drive
Fairbanks, Alaska 99701

Glenn & Lela Bouton
Tramway Bar Mine
665 Farmers Loop Road
Fairbanks, Alaska 99712

Kenneth H. Manning
P.O. Box 11027
Lansing, Michigan 48901

Ann Rhian, Esq.
P.O. Box 74490
Fairbanks, Alaska 99707

Josh Moore
Miners Advocacy Council
P.O. Box 546
Fairbanks, Alaska 99707

Harold Nevers
8148 Pinewood Drive
Juneau, Alaska 99801

Stanley C. & Rosalie Rybachek
Box 55698
North Pole, Alaska 99705

Edward J. Armstrong
Vice President
Silverado Mines
P.O. Box 2357
Fairbanks, Alaska 99707

Ann & Rodney Mitchell
3133 Chena Hot Springs
Road, Fairbanks, Alaska
99701

Cacy Patton
Bedrock Company
P.O. Box 1505
Fairbanks, Alaska 99707

Claude Morris
P.O. Box 546
Girdwood, Alaska 99516

Ronald Rosander
P.O. Box 129
McGrath, Alaska 99620

William Satterberg, Esq.
709 Fourth Avenue
Fairbanks, Alaska 90701

Donald Stein
DEPEM
105 Dunbar
Fairbanks, Alaska 99701

Dennis M. Wilfer
P.O. Box 192
Fairbanks, Alaska 99707

Trustees for Alaska
725 Christensen Drive #4
Anchorage, Alaska 99501

Bernard D. Wright
B&B Mining
3910 Tilleson Way
North Pole, Alaska 99705

Fred Wilkinson
P.O. Box 2702
Fairbanks, Alaska 99707

Thomas B. Yost
Administrative Law Judge
U.S. EPA
345 Courtland Street
Atlanta, GA 30365

and hand carried to:

Jamie Sikorski
U.S. EPA
1200 Sixth Avenue
Seattle, Washington 98101

Ann Prezyna, Esq.
U.S. EPA
1200 Sixth Avenue
Seattle, Washington

/s/ Marian L. Atkinson
Marian L. Atkinson
Region 10 Hearings Clerk

Dated July 5, 1989

APPENDIX G

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION X
1200 SIXTH AVENUE
SEATTLE, WASHINGTON 98101

SEAL

REPLY TO
ATTN OF: Mail Stop 521

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

JAN 31, 1985

Richard A. Neve', Commissioner
Alaska Department of Environmental Conservation
Pouch O
Juneau, Alaksa 99811

Re: NPDES Placer Mining Permits
- Proposed Permit Modification
- Evidentiary Hearing

Dear Dr. Neve':

Enclosed for your information are copies of the draft National Pollutant Discharge Elimination System (NPDES) modified permit pages 1, 2, 3, and 4 which we propose to issue to 446 placer miner permittees, and the public notice as it will appear in the local newspaper.

This initiates the 60-day period for state certification action as provided by 40 CFR 124.53. Final action on the modified permits cannot be taken until your agency has granted or denied certification under 40 CFR 124.55, or waived its right to certify. After the close of the public comment period, we will send copies of the proposed final permits for use in completing certification action.

We will be working with your agency in developing final permit conditions so that state certification actions can be completed immediately upon receipt of the final proposed permits. The State will be deemed to have waived its right to certify unless that right is exercised within 60 days of the receipt of this letter.

Also enclosed is a public notice of the granting of an evidentiary hearing on the 446 placer miner permits. Any person who wants to be admitted as a party to the evidentiary hearing must file a request within 15 days of the date of mailing, publication, or posting of the public notice, whichever last occurs. The Administrative Law Judge will grant requests which meet the requirements of 40 CFR Sections 124.71 and 124.75. EPA will notify you of the time and location for the evidentiary hearing when it has been determined by the Administrative Law Judge.

Technical questions regarding the permit modification may be referred to Bub Loiselle at (206) 442-1412, and questions regarding the evidentiary hearing process may be referred to Don Dossett at (206) 442-2710.

Sincerely,

/s/ Harold E. Geren
Harold E. Geren, Chief
Water Permits and Compliance Branch

Enclosures

cc: AOO-EPA (Juneau, Anchorage, and Fairbanks)
ADEC (Anchorage and Fairbanks)
OMB (Juneau, Anchorage, and Fairbanks)

APPENDIX H

I. SPECIAL CONDITIONS

A. *Effluent Limitations and Monitoring Requirements.*

INSTANTANEOUS MAXIMUM	MONTHLY AVERAGE	MONITORING
Settleable Solids		
1.5 ml/l	0.7 ml/l	Twice per day Each day of sluicing.
TURBIDITY		MONITORING
5 NTU's above background		*Once per week.
ARSENIC		MONITORING
0.05 mg/l		Once per month.

Settleable Solids

Analysis for settleable solids shall be performed as specified below:

1. Fill an Imhoff cone to the liter mark with a throughly (sic) mixed sample.
2. Settle for 45 minutes, then gently stir the sides of the cone with a rod or by spinning the cone.
3. Settle 15 minutes longer, then record the volume of settleable matter in the cone as milliliters per liter. Do not estimate any floating material.

Turbidity

Monitoring shall compare the turbidity values of the effluent stream with the background turbidity values. The sample results shall be reported on the Annual Discharge Monitoring Report.

*One sample shall be taken at a point that is representative of the discharge prior to mixing with the receiving water. Another sample shall be taken in the receiving water immediately above the point of discharge. Both samples shall be taken on the same day within a reasonable time frame, i.e., within twenty minutes to one-half hour. Monitoring shall be consistent with acceptable analytical procedures, i.e. through certified state of (sic) federal laboratories or by permittee using acceptable testing equipment.

Arsenic

Arsenic sample shall be taken immediately prior to discharge to the receiving stream.

Prohibitions

Discharges from the following processes are not authorized under this permit: mercury amalgamation, cyanidation, froth flotation, heap and vat leaching.

B. *Management Practices.*

1. The operator shall take whatever reasonable steps are appropriate to reduce the amount of organic and inorganic solids reaching the waters of the United States. This includes leaving all mined areas in a condition which will not cause additional degradation to the receiving waters over those resulting from natural causes.

2. To the maximum extent possible, all unused stream and runoff waters shall be diverted around active work and treatment facilities.

3. All activities in developing and operating treatment systems and diversions shall be done in a manner so as to minimize adverse impacts to the receiving water and to assure compliance with existing State water quality standards (18 AAC 70.020).

4. The operator shall maintain fuel handling and storage facilities in a manner which will prevent the discharge of fuel oil into the receiving waters or adjoining shoreline. A Spill Prevention Control and Countermeasure Plan (SPCC Plan) shall be prepared in accordance with provisions of 40 CFR Part 112 for facilities storing 660 gallons in a single container above ground, 1320 gallons in the aggregate above ground, or 42,000 gallons below ground.

C. *Monitoring, Records, and Reporting.*

1. The operator must maintain a record of the performance of the effluent treatment control system. These records shall be available for inspection at the mine site, and as a minimum shall include the following:

a. Effluent samples for settleable solids, turbidity, and arsenic shall be collected from the settling pond or other treatment systems immediately prior to discharge to the receiving stream. Turbidity samples shall also be taken in the receiving stream immediately upstream from the discharge. Additionally, the results of the monitoring shall be summarized and reported on EPA Form 3320-1 (Discharge Monitoring Report) and submitted to the Environmental Protection Agency, Region 10, 1200 Sixth Avenue, M/S 513, Seattle, Washington 98101, no later than November 30 of each year.

b. The condition of the treatment system shall be observed and recorded once during each day of operation. Stability of dikes, diversion ditches, and overflow structures should be observed as well as the presence of sediment buildup within settling ponds. Ponds shall be examined for the occurrence of short circuiting.

2. The permittee shall also provide the following information with the Annual Discharge Monitoring Report.

   a. Number and dimensions (including approximate depths) of settling pond(s) employed during the year.

   b. Approximate average amount of water used for sluicing per day.

   c. Effect of natural weather conditions, such as washouts, on the ponds.

   d. Estimated time and equipment needs to build/maintain treatment ponds.

   e. If settling ponds were not employed, state nature of treatment (i.e. non-direct discharge, filtration, etc.).

APPENDIX I

Fact Sheet

United States Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101
(206) 442-1214

Date: January 31, 1985

PROPOSED MODIFICATION OF A NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT TO DISCHARGE POLLUTANTS PURSUANT TO THE PROVISIONS OF THE CLEAN WATER ACT

Region 10 has tentatively determined to modify the turbidity and arsenic limitations in the National Pollutant Discharge Elimination System (NPDES) permits which were issued to Alaska Placer Miners in 1984. This fact sheet includes the tentative determination of the Environmental Protection Agency (EPA) to modify the permit and information on the procedures for public comment, public hearing and appeal. We call your special attention to the technical material presented in the latter part of this document.

Persons wishing to comment on the tentative determinations contained in the proposed permit modification may do so by the expiration date of the Public Notice. All written comments should be submitted to EPA as described in the Public Comments Section of the attached Public Notice.

Public hearings are scheduled for 9:00 am March 13, 1985 in Fairbanks, Alaska at Alaskaland Exhibit Hall and in

Anchorage, Alaska at 9:00 am March 15, 1985 at the Federal Building, 701 C. Street.

After the expiration date of the Public Notice, the Director, Water Division, will make final determinations with respect to the permit modifications. The tentative determinations contained in the draft permits will become final conditions if no substansive (sic) comments are received during the Public Notice period.

The permit modifications will become effective 30 days after the final determinations are made, unless a request for an evidentiary hearing is submitted within 30 days after receipt of the final determinations. An evidentiary hearing will be granted only if it meets all the requirements of 40 CFR 124.74.

The proposed NPDES permit modifications and other related documents are on file, may be inspected, and copies made in Room 10C, 1200 Sixth Avenue, Seattle, Washington 98101, at any time between 8:30 a.m. and 4:00 p.m., Monday through Friday. Copies and other information may be requested by writing to EPA at the above address to the attention of the Water Permits Section M/S 521, or by calling (206) 442-1214. This material is also available from the EPA Alaska Operations Office, Room E535, 701 C. Street, Anchorage, Alaska 99513; EPA Alaska Operations Office, 3200 Hospital Drive, Route 101, Juneau, Alaska 99801; and in Fairbanks at the Alaska Department of Environmental Conservation Office, 676 – Seventh Avenue, Fairbanks, Alaska 99701. A copying machine is available in the Seattle Office for public use at a charge of 20 cents per copy sheet. There is no charge if the total cost is less than 25 dollars.

I. *Activity*

The process of placer mining involves the removal of placer gold from alluvial deposits both in existing stream beds and ancient stream deposits. The placer mining process uses gravity and water to wash and separate gold in a sluice box and/or washing plant. Operations may consist of simple suction dredges, large merchanized (sic) operations, or large continuous bucket line floating dredges. These operations are all similar in that they recover free gold and other precious metals from placer deposits by washing the material through trommels, screens, and sluices.

In addition to the sluicing phase of mining operations, many operators must remove overlaying materials from the placer deposit. Depending on practices employed, such as mechanical stripping with heavy equipment or hydraulic stripping, some of this material may enter the receiving water. Direct discharges occurring as a result of overburden removal are not authorized by this permit.

Larger commercial operations include a wide range of systems for handling the placer deposits. Mechanical means include the normal range of earthmoving equipment and the more specialized floating dredges. The gold separation phase involves a gravity process of sluicing with the sluicing apparatus located either on a dredge, an elevated structure, or on bedrock. The sluicing phase may be preceded by separating the gravel into various classifications.

Placer deposits found in the stream beds may be located below or above the current stream channel. The deposits themselves are located immediately above the bedrock layer where significant flows of groundwater commonly occur. Groundwater flows which are intercepted at the mine pit, the drain, and any treatment facilities located downstream, also contribute to the discharge.

II. *Effluent Characteristics*

Discharges from placer mining operations consist of water and the materials found in the alluvial deposits (sand, silt, clay, trace minerals and metals, etc.). Some of the minerals and metals which have been measured include zinc, manganese, magnesium, iron, copper, lead, arsenic, chromium, molybdenum, strontium, zirconium, antimony, boron, mercury, beryllium, selenium, phosphate, potassium, sodium, sulfate, barium, chloride, calcium, and cyanide. Most of these parameters are found in small concentrations and are of little significance. The only toxic pollutant of concern in this group is arsenic.

The pollutant discharge limitations which EPA is considering to modify are turbidity and arsenic.

III. *Basis for Modifications*

Modification of the turbidity and arsenic provisions in the 1984 permits is due to a recent Ninth Circuit Court of Appeals decision. This decision is the end result of a series of challenges by Dr. G. M. Zemansky, Trustees of Alaska, and the Alaska Miners Association to the 168 original NPDES permits issued in 1976. The decision directs EPA to establish "end-of-pipe" *effluent limits* for pollutants that will meet the State Water Quality Standards.

To comply with the court's decision, EPA has concluded that to meet water quality standards, the effluent (end-of-pipe) limitation for turbidity must be 5 NTU's above background, and no greater than 0.05 mg/l for arsenic. This conclusion is based on the State's standards for rivers and streams that are designated as drinking water sources. If a placer mining facility meets the end-of-pipe limit, it will be in compliance with State Water Quality Standards.

The turbidity limit does not allow for the dilution effect of the receiving water which would take place within the 500 foot mixing zone allowed by State standards, because that kind of site specific information is not now available to EPA. Upon receipt of information demonstrating that the dilution effect of the receiving water justifies a less stringent limit, EPA would incorporate such a limit in the final modified permit. Such information should be provided prior to the close of the public comment period. It should be recognized, however, that in most cases the dilution factor would result in only a nominal increase in the allowable turbidity number.

IV. *Basis for Monitoring and Reporting Requirements*

EPA has concluded that the monitoring frequency for turbidity shall be once per week. Frequency for arsenic monitoring shall be once per month. Monitoring for arsenic has been established at less frequent intervals recognizing that monitoring is more difficult and costly for arsenic than turbidity. Arsenic and turbidity samples are to be collected at the same time in an attempt to establish a site-specific corrolation (sic) between these two parameters. Samples for monitoring purposes must be taken during sluicing at a time when the operation has reached an equilibrium. For example, samples should be taken when sluice paydirt loading and effluent discharge are fairly constant. With this stipulation, EPA believes that the required monitoring frequencies will be sufficient to determine compliance with permit limitations.

All self-monitoring requirements considered the remoteness of the mining operations, the magnitude of the pollutants discharged, and the practicability of the monitoring program. Reporting requirements specified in the existing permits remains unchanged.

V. *State Certification*

Section 301(b)(1)(C) of the Act requires that an NPDES permit contain conditions which ensure compliance with applicable State water quality standards or limitations. The limitations for turbidity and arsenic were established pursuant to State water quality standards. Section 401 requires that States certify that Federally issued permits are in compliance with State law.

These permits are for operations within waters (inland waters) of the State of Alaska. EPA is requesting State officials to review and provide appropriate certification to these draft permits pursuant to 40 CFR 124.53.

APPENDIX J

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION X
1200 SIXTH AVENUE
SEATTLE, WASHINGTON 98101

(Seal)
REPLY TO ATTN OF: M/S 521

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

JAN 31 1985

Dear Placer Miner:

Attached for your information is a Public Notice of two actions which will affect your current NPDES permit: 1) the Environmental Protection Agency's (EPA) granting of an Evidentiary Hearing on 446 NPDES permits issued in 1984, and 2) proposed permit modifications of the same permits.

Evidentiary Hearing

The Trustees for Alaska submitted a request for an evidentiary hearing on certain terms and conditions in all of the 1984 placer mining permits issued by EPA. The Trustees' request was granted in part. Requests for evidentiary hearing were also received from many placer miners. Most of these requests have also been granted in part.

The purpose of the evidentiary hearing is to determine whether the terms and conditions of the permits which have been challenged should be changed in the manner suggested by persons requesting the hearing. The time

and place for the hearing will be set by an Administrative Law Judge.

Permit Modifications

A recent Ninth Circuit Court of Appeals decision affects the NPDES placer mining permits that were issued in 1984. This decision is the end result of a series of challenges by Dr. G. M. Zemansky, Trustees for Alaska, and the Alaska Miners Association to the 168 original NPDES permits.

The decision directs EPA to establish "end-of-pipe" permit *effluent limits* for pollutants that will meet State water quality standards. Specifically, the Ninth Circuit Court has ruled that simply citing State Water Quality Standards as effluent limits is not consistent with the requirements of the Clean Water Act. According to Section 1311(b)(1)(c), EPA must include end-of-pipe effluent limits in all NPDES placer mining permits. Therefore, EPA must modify the turbidity and arsenic limitations in the 446 permits which were issued to placer miners in 1984.

The permits issued in 1984 stipulate that "the permittee shall not cause a turbidity increase in the receiving water greater than that limit set by applicable Alaska Water Quality Standards, measured not more than 500 feet downstream from the point the discharge enters the receiving water (measured according to the procedures specified in 18 AAC 70.020)."

The maximum allowable increase above background is 25 NTU. Permittees were required to monitor compliance by

visual observation. This permit requirement is a water quality standard limitation and is not consistent with the court's ruling that EPA must develop "end-of-pipe" effluent limitations. Specifically, turbidity and arsenic must be measured at the point where the effluent (sluice wastewater discharge) enters the receiving stream.

Permit modifications are necessary because the court observed that although water quality standards and effluent limitations are related, the two are entirely different concepts. Water quality standards are used to measure program effectiveness and performance. Effluent limits (end-of-pipe) are the basis of pollution prevention and elimination.

To comply with the court's decision, EPA has tentatively concluded that to meet water quality standards, the effluent limitation for turbidity must be no greater than 5 NTU's above background, and no greater than 0.05 mg/l for arsenic. This conclusion is based on the State's water quality standards for rivers and streams that are designated as drinking water sources. Compliance with the end-of-pipe limits will assure compliance with State Water Quality Standards.

The turbidity limit does not allow for the dilution effect of the receiving water which would take place within the 500 foot mixing zone allowed by state standards because this kind of site specific information is not available to EPA. Upon receipt of information demonstrating that the dilution effect of the receiving water justifies a less stringent limit, EPA would incorporate such a limit in the final modified permit. Such information should be provided prior to the close of the public comment period. It should

be recognized, however, that in most cases the dilution factor would result in only a nominal increase in the allowable turbidity number.

Permit Compliance

In 1984, EPA requested permittees to provide notification if they could not comply with the turbidity limitation contained in the permit. Many permittees did not notify EPA of their inability to comply. The Comment period on these modified permits gives placer miners another opportunity to provide information which will allow them to receive a 309 Administrative Order containing a compliance schedule. If a miner has not requested a compliance order, EPA will assume that the facility can comply with the turbidity limits in the permit.

If you believe you cannot meet the turbidity and arsenic limitations and need additional time to purchase and install equipment necessary to comply with these limits, you must notify EPA during the public comment period for the modification of the existing permits. Notification should include:

1. Mine location, permit number, and receiving stream.

2. A narrative description of the facility. Include any information regarding other mining operations in the immediate area that discharge to the same receiving water.

3. Describe the soil conditions at the facility; e.g., sand, silt, clay. Describe the effects on the receiving water quality as a result of sluicing.

4. Describe the equipment, if any, that need to be purchased and installed to reduce the turbidity discharge and meet the permit limitation.

5. Describe any physical modifications that have to be made to meet the limitations in the permit; e.g., install a partial or complete recycle system.

6. Describe the streamflow in the receiving water in relation to the discharge; e.g., receiving stream is 5 times that of the discharge, etc.

7. Based on visual observations, describe the impact the discharge has on the receiving stream; e.g., receiving stream obviously more turbid after discharge, bottom of receiving stream is not visible, etc.

8. Include available turbidity monitoring data, which is specific to the operation that will support your contention.

This information will be used by EPA to determine whether or not your facility will require a compliance schedule to meet the terms and conditions of the permit. The compliance schedule will be incorporated in a Section 309 Administrative Order. The order will be valid through December 1986. Any facility found to be out of compliance with turbidity and arsenic limits during the 1985 season that is not covered by a compliance order will be subject to an enforcement action.

Public Hearing

To allow all interested parties an opportunity to respond to the proposed permit modifications, EPA will hold public hearings in Fairbanks and Anchorage. The hearing in Fairbanks will be held on March 13, 1985 at Alaskaland Exhibit Hall starting at 9:00 a.m. The Anchorage hearing will be held at 9:00 am on March 15, 1985 at the Federal Building, 701 C. Street.

You will be notified of the time and location for the evidentiary hearing when it has been determined by the Administrative Law Judge.

The attached Public Notice initiates the public comment period on the permit modification. Following the close of the public comment period (March 15, 1985), we will consider the comments received in preparation of the final modified permit.

Bub Loiselle will be in EPA's Fairbanks office on March 11, 1985, to answer questions regarding the permit modification and public hearing procedure. He can be reached at (907) 456-0366. Questions may also be referred to Don Dossett at EPA's Seattle office at (206) 442-2710.

Sincerely,

/s/ Harold Geren
Harold E. Geren, Chief
Water Permits and Compliance Branch

cc: AOO, EPA (Juneau and Anchorage)
ADEC (Juneau, Anchorage, and Fairbanks)

APPENDIX K

BILL SHEFFIELD, GOVERNOR
DEPT OF ENVIRONMENTAL CONSERVATION

Telephone: (907) 465-2640

Address: Pouch O
Juneau, Alaska 99

April 29, 1985

Harold E. Geren, Chief
Water Permits and Compliance Branch
U.S. Environmental Protection Agency
Region X
1200 Sixth Avenue
Seattle, WA 98101

Dear Mr. Geren:

In accordance with Section 401 of the Clean Water Act of 1977 and provisions of the Alaska Water Quality Standards, the Department of Environmental Conservation has issued the enclosed Certificate of Reasonable Assurance for the National Pollutant Discharge Elimination System (NPDES) permits, as proposed for modifications to 446 placer mining permits issued in 1984 and for 93 additional placer mining discharges to be permitted in 1985, and as published in public notices in newspapers.

We are committed to assuring the continued legal operation of the Alaskan placer mining industry. For this reason, we have chosen to certify these permits. However, this agency's responsibility to protect the water quality of Alaskan streams requires that certain stipulations to the EPA permits be certified as well. We do so even as we

object to the way in which EPA's newly proposed turbidity limitation was developed.

Last year, DEC was forced to waive its right to certify the 446 proposed final NPDES placer mining permits. In our May 23 letter, we stated we were "unable to provide constructive stipulations until we are able to complete the data collection program which the State is embarking upon this summer." At recent hearings on proposed modifications to those 446 permits, DEC testified that last summer's studies demonstrated that more stringent settleable solids limits can be reasonably met by well-designed and maintained settling ponds.

Therefore, the Department, pursuant to section 401 of the Clean Water Act certifies the National Pollutant Discharge Elimination System permit to be issued to placer miner permittees, with the additional stipulation that the allowable instantaneous effluent limit for settleable solids not exceed 0.2 milliliters per liter (ml/l). Following are justifications for this decision.

EPA's Settleable Solids Limits Would Violate Water Quality Standards.

The settleable solids limits set forth in the proposed permits. 1.5 ml/l daily maximum and 0.7 ml/l monthly average, do not provide reasonable assurance for compliance with several criteria in 18 AAC 70.020(b) that protect contact recreation, growth and propagation of fish and wildlife, and water supply sources and require that no measurable increase in concentrations of sediment above natural conditions occur.

Settleable solids can be accurately measured in an Imhoff cone, down to a level of 0.1 ml/l as the lowest measurable gradation. Settleable solids are by far the most environmentally damaging constituent of the normal placer mining discharges. In addition to causing turbidity, settleable solids can smother spawning gravels and destroy bottom life, often for long periods with slow rehabilitation and recovery rates.

Lowered Settleable Solids Reduces Turbidity

There is an indisputable cause-and-effect relationship between settleable solids and turbidity. The difference between 1.5 ml/l and 0.2 ml/l settleable solids results in several tons of sediment being removed from a typical mine discharge each day. The corresponding difference in turbidity would be on the order of many hundreds or low thousands of NTUs.

The Legal Link Between Turbidity and Settleable Solids

We recognize that EPA's appropriation of the State's water quality standard for turbidity as an effluent limitation is an interim measure until EPA's Effluent Guidelines are established nationally for the placer mining industry. Nonetheless, we protest the use of a biologically-based standard intended for water quality application within a stream as a substitute for a technically based limitation intended for application at the end-of-pipe.

As confirmed in the *Trustees for Alaska and Zemansky v. EPA* 749 F.2d 549 (9th Cir 1984) opinion. "[e]ffluent limitations are a means of achieving water quality standards"

and the court observed that water quality standards and effluent limits are related. While we do not concur with your decision to use the State's water quality standard as the effluent limitation for turbidity, we do believe that EPA should have recognized the scientific connection between settleable solids and turbidity and modified the settleable solids limitation particularly in light of the 1984 field season data, presented below.

Good Ponds Can Achieve 0.2 ml/l Settleable Solids.

Although the Clean Water Act does not mandate the consideration of economics and "achievability" in the development of water quality criteria, nevertheless, scientific studies show the stipulated 0.2 ml/l settleable solid limit is achievable. Several 1984 studies, including one widely praised by the placer mining community, prove that 0.2 ml/l can be met by well-designed and maintained settling ponds. These studies include the following.

1. The Shannon and Wilson report

This study was aimed at recycling operations which have several times the solids loading of once-through settling ponds. However, even well-operated recycling ponds can meet the 0.2 ml/l settleable solids stipulated limits. From page 4-46 of the Phase 3 Final Report, the three best-performing recycle sites had final pond effluents which averaged *0.1 ml/l* settleable solids.

2. Region X Trend Analysis

Based upon hourly sampling of several days duration at seven sites in 1984, well-designed

and maintained settling ponds met the 0.2 ml/l stipulated limit 99.9% of the time. The few exceptions resulted from pond upsets and did not represent normal operations.

3. EPA Effluent Guidelines Studies

In 142 samples from 44 mines studied in 1984 and 1983, the stipulated limit of 0.2 ml/l was met 78% of the time. These included mines with filled-up ponds and other operational problems. The lowest detection limit for these studies was 0.1 ml/l.

4. Canadian Mine Study

In 22 mines studied in 1984, 60% could meet the 0.2 ml/l Canadian government objective. These included poorly designed and maintained ponds.

5. DEC Field Sampling

In 20 samples of ten mines in the Fortymile Mining District in 1984, 60% could meet the 0.2 ml/l stipulated limit. Results from poorly maintained ponds were included. One operation had no pond and another washed out.

Most of the above comments were highlighted in the DEC's testimony at the March 13 and 15, 1985 public hearings for 1984 and 1985 placer mining permits.

Clearly, a normally operating pond with good design features and adequate maintenance can meet the stipulated 0.2 ml/l settleable solids limit. The permits contain provisions for consideration of upsets, by-passes, washouts, and the like. During field monitoring efforts, Department staff will use their professional judgement to document such occurrences.

The State's certification with more stringent settleable solids limits is immediately enforceable through Judge Yost's February 22 Order. Requirement #5 states that "[a]ll activities . . . in operating treatment systems . . . shall be done in a manner to assure compliance with existing State Water Quality Standards (18 AAC 70.020)."

We note and endorse Judge Yost's affirmation of Management Practices in Requirement #4, which states that, to the maximum extent possible, all unused stream and runoff waters shall be diverted around active work and treatment facilities.

In a press release distributed at the Placer Mining Conference on March 30, Commissioner Ross also announced this season's update of the priority stream list and outlined our enforcement priorities for the 1985 mining season. A copy is attached. The criteria for selection of priority streams were basically the same as used and identified in last year's Interagency Placer Mining Guidelines.

On these priority streams, the DEC, Fish and Game, and Natural Resources staff will be assisting placer miners in their applications for 309 Compliance Orders. We intend to identify with the individual miner those reasonable practices which have some effect in reducing turbidity impacts on downstream users. These 309 Compliance Orders will require certain site-specific best mining practices which, through a "sweat equity" approach to reduce the outlay of money for equipment, will result in use of less water use[,] tundra discharge, tailings filtration, as other practices that will produce cleaner water.

Priority streams will also receive primary attention in inspections, technical assistance, and follow-up of citizen complaints.

This Department action represents only one element of the overall project level coastal management consistency determination issued by the Office of Management & Budget under AS 44.19 and 6 AAC 50.070 for those permits in the coastal zone.

Department of Environmental Conservation regulations provide that any person who disagrees with this decision may request an adjudicatory hearing by filing a statement of issues under 18 AAC 15.200-310. The hearing request should be mailed to the Commissioner of the Alaska Department of Environmental Conservation, Pouch 0, Juneau, Alaska 99811, or delivered to his office at 3220 Hospital Drive, Juneau. Failure to submit a hearing request within thirty (30) days of receipt of this letter constitutes a waiver of the right to judicial review of this decision.

Thank you for your cooperation in this matter. I especially appreciate the time and consideration your staff attorneys have provided our Attorney General's Office.

Sincerely,

/s/ Keith Kelton
Keith Kelton
Director
Environmental Quality

KK/RB/bb

Enclosure

cc: Corps of Engineers
EPA, Alaska Operations Office
Attorney General's Office, Juneau
ADF&G, Habitat Division, Juneau
NMFS
F&WS
ADEC
Regional Offices
Div. of Governmental Coordination

APPENDIX L

STATE OF ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION CERTIFICATE OF REASONABLE ASSURANCE

A Certificate of Reasonable Assurance, as required by Section 401 of the Clean Water Act, has been requested by the U.S. Environmental Protection Agency for modifications to 446 placer mining discharges permitted in 1984 and for 93 placer mining discharges to be permitted in 1985, as described in letters to applicants and notices published in newspapers.

The proposed activities are located as shown on public notices published in newspapers and as attached to this certificate.

Public notice of the application for this certification has been made in accordance with 18 AAC 15.180.

Water Quality Certification is required for the proposed activities because the activity will be authorized by a National Pollutant Discharge Elimination System permit and a discharge will result from the proposed activities.

Having reviewed the application and comments received in response to the public notice, the Alaska Department of Environmental Conservation certifies that there is reasonable assurance that the proposed activity, as well as any discharge which may result, is in compliance with the requirements of Section 401 of the Clean Water Act which includes the Alaska Water Quality Standards, 18

AAC 70, and the Standards of the Alaska Coastal Management Program, 6 AAC 80, provided that the instantaneous maximum settleable solids effluent limitation be 0.2 milliters per liter.

/s/ Keith Kelton 9/24/85
Keith Kelton, Director
Environmental Quality

APPENDIX M

IN THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION FOR THE STATE OF ALASKA

IN RE: Administrative Adjudication of "Certification" of NPDES Permits for Certain Alaska Placer Miners

SUMMARY OF ISSUES AND FACTUAL MATTERS

COMES NOW Miners Advocacy Council (MAC), by and through its attorney of record, William R. Satterberg, Jr., and pursuant to 18 AAC 15.240(a)(1), offers the following Summary of Issues and Factual Matters which MAC will present at the Adjudicatory Hearing before the Deciding Officer.

At the Adjudicatory Hearing, MAC will present the following issues and factual matters:

1. *PROCEDURAL DUE PROCESS* – That the State of Alaska's .2 ml/l settleable solids "certification" constitutes a change in the State Water Quality regulations, and that in so "certifying," the State did not conform with the applicable due process requirements of the Alaska Administrative Procedures Act (APA), especially regarding the required notice and hearing; that the same argument applies to the 5 NTU effluent limitation since such limitation constitutes a new standard that will be enforced by State authorities.

2. *INVERSE CONDEMNATION* – That the four regulations, the .2 ml/l settleable solids effluent, the 5 NT turbidity effluent, "no measureable increase," and the 5 NTU State Water Quality standard, effect a "taking" of

placer miner's property without just compensation, contrary to the United States and Alaska Constitutions. The thrust of this argument is that the regulations are cost prohibitive, if indeed they can be complied with at all, and that the regulations thus render placer mining economically unviable.

3. *SUBSTANTIVE DUE PROCESS* – This issue is similar to the inverse condemnation issue but is framed in terms of the regulations' depriving placer miners of property without due process of law. Related to this issue are the facts that the regulations, especially due to their blanket application, have no rationale (sic) basis, are not based on sound scientific rationale and scientifically defensible methods, and as such, are arbitrary and capricious. Part and parcel of this argument is the fact that the more stringent regulations do not confer any additional benefits upon society because such stringent regulations are not necessary to protect fish from the effects of placer mining; rather, evidence will show that the regulations must be site-specific and measured above background, especially since fish have adapted to some streams on which mining is done, while other streams have no fish population whatsoever. In addition, it is contended that a turbidity effluent should not exist because such effluent does not measure pollutants or necessarily indicate their presence. As such, a turbidity effluent is on its face arbitrary and capricious.

4. *ESTOPPEL AND WAIVER* – That the State of Alaska delayed "certification" beyond the time allowed in EPA regulations and thereby waived its rights to "certify" and that the State waited until the "eleventh hour" before "certifying" with the effect that miners justifiably

relied on the .7 ml/l monthly average and 1.5 ml/l daily maximum "status quo standard," and therefore the State should be estopped from "certifying" to the detriment of placer miners.

5. *CIVIL RIGHTS VIOLATIONS* – That the State has violated the civil rights of placer miners by issuing "gag orders" denying miners access to government personnel and by excluding miners from what should have been open public meetings.

6. *EQUAL PROTECTION UNDER THE LAW* – That the State has colluded, and perhaps even conspired, with environmental interests in an effort to selectively single out the placer mining community for prosecution.

7. *ALASKA'S OPEN MEETINGS ACT* – That State officials, including the Governor and members of the Department of Environmental Conservation (DEC) and other state agencies conducted "closed-door" meetings with environmental interest (sic) before and during the course of the "certification" process, at which meetings the State's "certification" and enforcement thereof were deliberated upon. Since such meetings are in clear violation of Alaska's Open Meetings Act, AS 44.62.310.312, the State's "certification" should be vacated as void and enforcement of the contested regulations should be enjoined.

DATED this 22nd day of August, 1985, at Fairbanks, Alaska.

LAW OFFICES OF
WILLIAM R. SATTERBERG, JR.

By: /s/ William R. Satterberg, Jr.
William R. Satterberg, Jr.
Attorney for Miners
Advocacy Council

IN RE: Administrative Hearing

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA FOURTH JUDICIAL DISTRICT

MINERS ADVOCACY COUNCIL, INC., a non-profit corporation organized and existing under the laws of the State of Alaska,

Appellant,

TRUSTEES FOR ALASKA, NORTHERN ALASKA ENVIRONMENTAL CENTER,

Plaintiffs-Intervenors,

vs.

STATE OF ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and WILLIAM ROSS, Commissioner of the Department of Environmental Conservation, STATE OF ALASKA DEPARTMENT OF FISH AND GAME, DON COLLINSWORTH, Commissioner of the State of Alaska Department of Fish and Game, ATTORNEY GENERAL'S OFFICE, GOVERNOR WILLIAM SHEFFIELD, Governor of the State of Alaska, GOVERNOR WILLIAM SHEFFIELD, in his individual capacity, DON COLLINSWORTH, in his individual capacity, and WILLIAM ROSS, in his individual capacity, and their unknown agents,

Appellees.

(Filed May 19, 1986)

Case No. 4FA-85-1690 Civ

AMENDED STATEMENT OF POINTS ON APPEAL

COMES NOW, Miners Advocacy Council, Inc., by and through its attorney of record, William R. Satterberg, Jr., and hereby states as its amended statement of points on appeal the following:

1. That, because the State's "certification" constitutes a "regulation" as defined by Alaska's Administrative Procedures Act and because the State's "certification" failed to meet the due process requirements that are mandatory when a State agency so promulgates a "regulation," the State's "certification" is null and void; thus, the Deciding Officer lacked subject matter jurisdiction to render a decision.

2. That, because the State's "certification" constitutes action taken contrary to the terms of Alaska's Open Meetings Act, AS 44.62.310-.312, the State's "certification" is null and void; thus, the Deciding Officer lacked subject matter jurisdiction to render a decision.

3. That, the Deciding Officer's decision to deny MAC's motion for stay was arbitrary and capricious due to the Deciding Officer's failure to adequately consider the evidence offered by MAC.

4. That, the Deciding Officer's decision had no rational basis due to the Deciding Officer's failure to adequately consider the evidence offered by MAC and due to the Deciding Officer's basing his decision on data and studies that were conducted unscientifically with respect to both method and procedure and are therefore statistically distorted.

5. That, the Deciding Officer's decision was arbitrary and capricious due to the Deciding Officer's failure to consider the effects of the 5 NTU effluent limit, the 5 NTU water quality standard, and the "no measureable increase" water quality standard.

6. That, the Deciding Officer's decision has no rational basis due to the Deciding Officer's failure to consider the effects of the 5 NTU effluent limit, the 5 NTU water quality standard, and the "no measureable increase" water quality standard.

7. That, all the above points support Appellant MAC's primary point on appeal, which is that the Deciding Officer erred in not granting MAC's Motion for Stay.

8. That, the Deciding Officer erred in failing to allow the turbidity standard to be evaluated as part of the certification process and certification hearings.

9. That, the Deciding Officer erred in ruling that certifications could be made on a blanket basis, as opposed to a site specific basis.

10. That, the Deciding Officer erred in ruling that the State of Alaska had not waived its rights to certification with respect to those NPDES permit holders for 1984 permits.

11. That, the Deciding Officer erred in holding that the State of Alaska could modify existing permit conditions with respect to settleable solids in that the Trustees for Alaska decision dealt only with arsenic and turbidity standards, and not settleable solids with respect to modification.

12. That, the Deciding Officer erred in holding that .2 ml/l was the proper certification limit for all NPDES permits within the State of Alaska.

13. That, the Deciding Officer erred in holding that no agreement existed, contrary to law, as between the Trustees for Alaska, Northern Alaska Environmental Center, or other environmental groups and the State of Alaska with respect to a limit for settleable solids for certification.

14. That, the Deciding Officer erred in holding that the turbidity limit of 5 NTU could co-exist with the settleable solids limitations of .2 ml/l.

DATED this 19th day of May, 1986, at Fairbanks, Alaska.

LAW OFFICES OF
WILLIAM R. SATTERBERG, JR.

By: /s/ William R. Satterberg, Jr.
William R. Satterberg, Jr.

IN THE SUPREME COURT FOR THE
STATE OF ALASKA

TRUSTEES FOR ALASKA; NORTHERN ALASKA ENVIRONMENTAL CENTER,

Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and WILLIAM ROSS, Commissioner of the Department of Environmental Conservation,

Appellee.

(Filed Aug. 28, 1987)

MINERS ADVOCACY COUNCIL, INC.,

Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, et al,

Appellee.

Case No. 4FA-85-1690 Civil

STATEMENT OF POINTS ON APPEAL

COMES NOW Appellant, Miners Advocacy Council, Inc., by and through its attorney of record, William R. Satterberg, Jr., and hereby designates as the Statement of Points on Appeal the following:

1. The Reviewing Court erred in determining that a regulation was not involved by the activities of the State of Alaska in certifying the NPDES permits.

2. The Reviewing Court erred in determining that site-specific evaluations were not required in certifying NPDES permits.

3. The Reviewing Court erred in determining that the due process rights of the permittees were not violated by the failure of the State of Alaska to hold proper hearings prior to the promulgation of the permits.

4. The Reviewing Court erred in holding that the certification of the NPDES permits was an adjudicative hearing process which had been properly followed by the state.

5. The Reviewing Court erred in determining that the State of Alaska had not acted arbitrarily and capriciously in the certification of the NPDES permits.

DATED this 28th day of August, 1987, at Fairbanks, Alaska.

LAW OFFICES OF
WILLIAM R. SATTERBERG, JR.

/s/ William R. Satterberg, Jr.
William R. Satterberg, Jr.

IN THE SUPREME COURT FOR THE
STATE OF ALASKA

MINERS ADVOCACY COUNCIL, INC.,

Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, et al,

Appellee.

TRUSTEES FOR ALASKA; NORTHERN ALASKA ENVIRONMENTAL CENTER,

Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and DENNIS KELSO, Commissioner of the Department of Environmental Conservation, and MINERS ADVOCACY COUNCIL, INC.,

Appellees.

Supreme Court No. S2369 & S2370
(Superior Court No. 4FA-86-1556 Civil)
(Consolidated with 4FA-86-1690 Civil)

APPEAL FROM THE SUPERIOR COURT
JUDGE JAY HODGES
BRIEF OF APPELLANT MINERS ADVOCACY COUNCIL

LAW OFFICES OF WILLIAM R. SATTERBERG, JR.
709 Fourth Avenue
Fairbanks, Alaska 99701
Attorney for Appellant, MAC

/s/ William R. Satterberg, Jr.
William R. Satterberg, Jr.

FILED in the Supreme Court
of the State of Alaska
this 16 day of December, 1987.

/s/ Teresa High
Deputy Clerk

* * *

III. *The State Violated the Due Process Rights Of NPDES Permittees By Failing To Hold Proper Hearings Prior To The Permits Promulgating*

When a State certifies an NPDES permit, the State's activities in certifying constitute state action for the purposes of due process. *Snyder v. Callaghan*, 168 W.Va. 265, 284 S.E.2d 241, 247 n.2 (1981). Regardless of how the action is characterized, *id.*, the State must afford all persons the hearings required by law. *See id.* at 247-48. Here the State failed to comply with this constitutional mandate.

The NPDES permitting process is by nature an adjudicatory one. *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876 (1st Cir. 1978), *cert. denied*, 439 U.S. 824, 99 S.Ct. 94, 58 L.Ed.2d 117 (1978). Its purpose is to determine facts in particular cases, not to promulgate policy-type rules or standards. *Id.* at 876. The same is apparent in the DEC's certification regulations, that each permittee is to be given individualized hearing and consideration. *See* 18 AAC 15.130-.160; 40 C.F.R. § 121.2(a)(2).

A similar requirement is found in the Alaska Statutes. AS 46.03.070 provides that the DEC is to hold public

hearings before making determinations as to what limitations indicate a polluted condition contrary to the purposes for which the particular waters are used. Pursuant to this provision, each permittee was entitled to have a hearing in his or her particular case. *See Wisconsin Electric*, 287 N.W.2d at 130. In contrast, the DEC held *no* such hearing, but instead lumped all the permittees together in a policy pile and promulgated a forbidden decision that abridged the due process rights of all concerned, the permittees and the public alike. *See Seacoast Anti-Pollution League*, 572 F.2d at 876-77.

In sum, it is a fundamental component of due process that an agency afford to each person before it is (sic) the hearings and other procedures required by those laws and regulations under which the agency operates. *Heffner*, 420 F.2d at 812; *Hopkins v. Maryland Inmate Grievance Commission*, 40 Md.App. 329, 391 A.2d 1213, 1217-18 & n.5 (1978). An agency's failure to do so "cannot be reconciled with the fundamental principle that ours is a government of laws, not men." *Heffner*, 420 F.2d at 812 (quoting *Hammond v. Lenfest*, 398 I.2d (sic) 705, 715 (2d Cir. 1968)). In a prime example, the DEC here not only failed to hold the proper hearings required by the applicable environmental statutes and regulations, the DEC also neglected to follow the procedures for promulgating a "regulation," *see Part I., supra*, declined to evaluate the permits on a case-by-case, site-specific basis as required by law, *see Part II., supra*, and ignored many of the adjudicative requirements set forth in the applicable regulations, *see Part IV., infra*.

IV. *The State Failed To Follow The Proper Adjudicative Requirements In Certifying The Permits*

A. *Case-By-Case, Site-Specific Permits*

As MAC discussed in *Part II, supra,* the State was to have evaluated the permits on a permit-by-permit, site-specific basis. This is inherent in the individualized nature of the NPDES permit process. *Seacoast Anti-Pollution League,* 572 P.2d (sic) at 876. Indeed, the only logical result of the State's failure to evaluate the specific permits and arrive at specific terms, is that the State evaluated the permits in general and promulgated a general term applicable to each and all, a "regulation." *See Part I, supra.*

B. *Waiver*

40 C.F.R. 125.53(c)(3) provides that "the State will be deemed to have waived its right to certify unless that right is exercised within a specified reasonable time *not to exceed 60 days* from the date the draft permit is mailed to the certifying State agency unless the Regional Administrator finds that unusual circumstances require a longer time." (emphasis added) In the instant case, it is unquestionable, and the Deciding Officer so found, that the DEC's certification was well beyond the 60-day limit set forth, both at 40 C.F.R. 124.53(c)(3) and in the State certification regulations found at 18 AAC15.(AR 1475, 1477, 1485). Moreover, ther (sic) was *no* evidence introduced whatsoever to indicate that the DEC requested or that EPA granted an extension of time for the DEC to render its certification decision. Accordingly, pursuant to 40 C.F.R. 125.54(c)(3), the DEC lacked jurisdiction to certify, as it did, after expiration of the 60-day period.

It is a fundamental principle of law that the DEC was to have followed *all* applicable regulations when it conducted the certification at issue. *See United States v. RCA Alaska Communications, Inc.*, 597 P.2d 489, 498 (Alaska 1979). From this, it logically follows that "[w]here rulings by administrative agencies are not in accord with the basic requirements of the statutes relating to those agencies, the decisions of the agencies are void." *Foster v. Board of Dentistry*, 714 P.2d 580, 581 (N.M. 1986). In the words of another court:

> An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. *When it fails to do so, its action cannot stand and courts will strike it down.*

Heffner, 420 F.2d at 811 (emphasis added).

A case analogous to MAC's is *Foster, supra*. In *Foster*, the pertinent provision required the agency to render and sign its decision within a 90-day period. 714 P.2d at 580-81. When the agency failed to act within the 90-day period but rendered and signed its decision five days late, the plaintiff appealed, arguing that the agency lacked jurisdiction, only having authority to render and sign its decision within the 90-day period. 714 P.2d at 580. The agency, on the other hand, contended that "the requirement that the decision be signed within 90 days after completion of the hearing is merely procedural, not jurisdictional, and to argue that the [agency] lost jurisdiction over [Appellant] merely for failing to sign the decision within the 90 days leads to the unintended result of having to start the proceedings against [Appellant] all

over again." 714 P.2d at 581. After analyzing these various arguments, the *Foster* court agreed that "the [agency's] failure to render and sign its decision under the terms of the [relevant statute] makes its decision null and void." *Id.* As the court explained:

> "The words of [the statute] are mandatory. There is no room for constru[ction] . . . Where rulings by the administrative agencies are not in accord with the basic requirements of the statutes relating to those agencies, the decisions of the agencies are void. The ninety day period required under [the statute] expired on August 1, 1984. The [agency's] decision was not signed until August 6, 1984, five days after the statutory requirement ended. *Because the [agency] failed to take action within the required ninety day period, its decision is void and must be reversed.* To rule otherwise would ignore the plain language of [the statute]' " (sic) *Id.* (citation omitted) (emphasis added)

Here, the DEC rendered its decision almost one month after the expiration of the certification period. (AR 1475, 1477). This action is plainly contrary to the language and intent of 40 C.F.R. 125.53(c)(3), that ["]the State *will* be deemed to have waived its right to certify unless that right is exercised within a reasonable time not to exceed 60 days." The requirement is not "may" but mandatory, and the "agency's failure to follow regulations is fatal to the deviant action." *Union of Concerned Scientists v. Atomic Energy Commission*, 499 F.2d 1069, 1072 (D.C.Cir. 1974).

As a final note, the State may contend, as the Deciding Officer did, that this issue is not one for resolution by this Court, and that the "argument is really one which

would more appropriately be made to the EPA than to the State." (AR 1486). Any such contention, however, is firmly against a string of federal decisions consistently agreeing that "the proper forum to review the appropriateness of a state's certification is the state court." *Roosevelt Campebello Intern. Park v. U.S.E.P.A.*, 684 F.2d 1041, 1056 (1st Cir. 1982); *see also United States Steel Corp. v. Train*, 556 F.2d 822, 837-39 & n.22(7th Cir. 1977); *Lake Erie Alliance v. U.S. Army Corps of Engineers*, 526 F.Supp. 1063, 1074 (W.D.Pa. 1981), *affirmed*, 707 F.2d 1392 (3rd Cir. 1983), *cert. denied*, 464 U.S. 915, 104 S.Ct. 277, 78 L.Ed.2d 257 (1983), *Mobil Oil Corp. v. Kelley*, 426 F.Supp. 230, 234-35 (S.D.Ala. 1976).

C. *Permit Modifications Limited To Turbidity and Arsenic*

When the State and EPA issued their Public Notice of Proposed Modifications to the 1984 NPDES permits, the notices made clear that the modifications concerned solely the effluent limits for turbidity and arsenic, nothing more. (AR 1251-98, 2804E-2804CAA). As to this action, the Code of Federal Regulations makes explicit provision that only the terms subject to modification may be changed. 40 C.F.R. ___ 122.62. "When a permit is modified, only the conditions subject to modification are reopened." *Id.* Accordingly, the effluent limitations for settleable solids were to have been left undisturbed. The State's prying open of the settleable solids limitation and sudden insertion of a different limit is directly contrary to this basic prohibition and, as such, fatal to the deviant action. *See Union of Concerned Scientists*, 499 F.2d at 1072; *Foster*, 714 P.2d at 581.

D. *Failure to Provide Statement of Degree To Which Conditions Could Be Made Less Stringent*

A pertinent provision of 40 C.F.R. ___ 124.53(e)(3) reads as follows:

> State certification shall be in writing and *shall include [a] statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law,* including water quality standards. *Failure to provide this statement for any condition waives the right to certify* or object to any less stringent condition which may be established during the EPA permit issuance process. (emphasis added)

One will search in vain for any DEC statement in any permit as to any condition at all which may be made less stringent without violating State law. The DEC simply failed on every count to provide the requisite statement, and as § 124.53(e)(3) explains, must be held to have waived its right to certify.

When one examines the record, the State's failure is all the more blatant since the uncontroverted facts indicate that the impermissibly inserted .2 ml/l settleable solids effluent could have been greatly relaxed, depending on the specific mining site, and that the same holds for the turbidity effluent, if indeed a turbidity effluent can ever be justified at all.

1. *Disregard of Dilution Ratios for Settleable Solids*

In the proceeding before Deciding Officer Ashburn, evidence was presented, and the Deciding Officer so found, dilution ratios that ranged from 1:1 to 1:9, depending on the site-specific of the particular operation. (AR

1479). Plugging this information into a mathematical formula, the following equation represents the allowable effluent on a site-specific basis:

A = .1ml/l x D

where A = Allowable effluent
D. = dilution factor

.1 ml/l = no measuarable increase at measuring point downstream[3]

Thus, where the dilution ration of effluent to receiving water is 1:1, a .2 ml/l effluent will satisfy the .1 ml/l "no measurable increase" downstream. However, where the dilution ratio is 1:9, the .2 ml/l requirement is unduly harsh since a 1.0 ml/l effluent will nonetheless satisfy the .1 ml/l Water Quality Standard (WQS).

2. *The Turbidity Un-Effluent*

In rendering their decisions, both the DEC and the Deciding Officer neglected to consider the effects of the 5 NTU turbidity effluent limit in the NPDES permits. Instead, the .2 ml/l standard was considered as an isolated effluent limit. (R 1481).

The evidence presented by those well-versed in the matter established that, though there was some difference of opinion about the scientific and economic attainability of the State's "no measurable increase" standard, the 5

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[3] This is the applicable State Water Quality Standard (WQS) for settleable solids. *See* 18 AAC 70.020(b) (table).

NTU effluent limit for turbidity is absolutely unattainable so as to be confiscatory and effect a taking on its face. (AR 237-41; AR 246-56; AR 256-318; AR 350-53; AR 354-57) *See Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct.2138, 65 L.Ed.2d 1061 (1980).

What is most remarkable about the State's utilization of the 5 NTU limit is that where the natural turbidity of the water is more than 50 NTU, the applicable State Water Quality Standard allows an increase in turbidity of 5 NTU *plus ten (10) percent of the amount that the natural turbidity of the water exceeds 50 NTU, with a maximum increase of 25 NTU.* 18 AAC 70.020(b)(table).

It should further be noted that the 5-25 NTU range for turbidity set forth at 18 AAC 70.020(b) is a State Water Quality Standard and not an effluent limit. The 5-25 NTU range is like the "no measureable (sic) increase" WQS applicable to settleable solids, *see Part IV.D.01. & n.3., supra;* they both address the WQS to be attained by the dilution of the effluent prior to the measuring point. Thus, the same overstringency arises as with the settleable solids effluent. Assuming similar dilution rations of from 1:1 to 1:9, *see Part IV.D.1., supra,* the allowable turbidity effluents should be from 10 NTU to 250 NTU, with 5 NTU nowhere to be found. To find otherwise would require the magical assumption that turbidity somehow propagates exponentially in the course of being diluted.

The real question, however, is what is a turbidity effluent doing in the permits in the first place? Turbidity is in essence a measurement of light passing through water. *See* 18 AAC 70.020 Notes. It is a condition or quality of the water, a water quality standard. *See Id.* at

020(b). The Clean Water Act (CWA), however, is not concerned with regulating the discharge of "conditions" but with regulating the discharge of "pollutants," a definition which "turbidity" simply fails to meet. *See National Wildlife Association v. Gorsuch*, 693 F.2d 156, 171-72 (D.C.Cir. 1982). "Clear water is not within the definition of a pollutant under the CWA." *Orleans Audubon Society v. Lee*, 742 F.2d 901, 910, *rehearing en banc denied*, 750 F.3d 69 (1984).

Interestingly, the State itself recognized in its certification decision the inherent contradiction of utilizing a State Water Quality Standard as an effluent limit. (AR 3) The State, however, neglected to take the appropriate step and strike the turbidity term from the permits.

3. *On The Record Requirement Ignored*

As MAC discussed in *Parts II and III, supra*, the NPDES process is a highly individualized one that is fact finding and not policy making in nature. *See Seacoast Anti-Pollution League*, 572 F.2d at 876-77. Thus, when the DEC made its permit decisions, it was to have based its decision on that information contained in the particular permit, plus the record generated at the public hearings on the matter. 40 C.F.R. ___ 121.2(a)(2); 18 AAC 15.160. As such, the DEC was to have made its certification decisions on the record in accordance with the information in the permits and the evidence adduced at the hearings. *Seacoast Anti-Pollution League*, 572 F.2d at 877-78. In practice, however, this requirement was ignored.

The person entrusted with formulating the DEC's decision, Randolph Bayliss, testified that most of the various applications for NPDES permits were not even reviewed at all. (AR 3266). Apparently, the conglomerated hearings that were held served as the same mere formality since the final decision was solely the result of meetings with various concerned parties, discussions among agency personnel, and information gathered from Mr. Bayliss' personal readings and experience. (AR 911-919, 3234-71). This "off the record" certification is the exact opposite of that contemplated. The DEC was to have certified "limited to the administrative record as a basis for decision making." *Herbert,* 743 P.2d at 397. Instead, the agency consciously excluded the record and made a self-informed policy choice.

The tragedy of the DEC's method is twofold. Not only should such decisions be based on the record to insure reasoned decision making, equally as important, they are to be based on the record so as to guarantee meaningful judicial review. *Southeast Alaska Conservation Council v. State,* 665 P.2d 544, 549 (Alaska 1983)(*SEACC*); *Seacoast Anti-Pollution League,* 572 F.2d at 876. Practices such as the DEC's, then, not only dislocate the permitting process, they also hamper this Court's function of engaging in the requisite probing review. *See SEACC,* 665 P.2d at 549. They are practices that are never to be condoned. Where those responsible for rendering a decision are unfamiliar with the record on which they are to base their decision, the decision must be set aside. *Messer v. Snohomish County Board of Adjustment,* 19 Wash.App. 780, 578 P.2d 50, 59 (Wash.App. 1978).

DATED this 16th day of December, 1987, at Fairbanks, Alaska.

LAW OFFICES OF WILLIAM R. SATTERBERG, JR.

By /s/ William R. Satterberg, Jr.
William R. Satterberg, Jr.

IN THE SUPREME COURT FOR THE STATE OF ALASKA

MINERS ADVOCACY COUNCIL, INC.,

Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, et al,

Appellee.

TRUSTEES FOR ALASKA; NORTHERN ALASKA ENVIRONMENTAL CENTER,

Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and DENNIS KELSO, Commissioner of the Department of Environmental Conservation, and MINERS ADVOCACY COUNCIL, INC.,

Appellees.

Supreme Court No. S2369 & S2370
(Superior Court No. 4FA-86-1556 Civil)
(Consolidated with 4FA-86-1690 Civil)

REPLY BRIEF OF APPELLANT MINERS ADVOCACY COUNCIL

LAW OFFICES OF
WILLIAM R. SATTERBERG, JR.
709 Fourth Avenue
Fairbanks, Alaska 99701
Attorney for Appellant, MAC

/s/ William R. Satterberg, Jr.
William R. Satterberg, Jr.

FILED in the Supreme Court
of the State of Alaska
this 29th day of March, 1988.

/s/ Peggy D. Lewis
Deputy Clerk

* * *

B. *The DEC Failed To State To What Extent Permit Conditions Could Be Made Less Stringent.*

In the Brief of Appellee at 5-6 and 36-37, the State continues to maintain that it is under no duty whatsoever to indicate to what extent individual permit conditions can be made less stringent and still meet the requirements of State law. To the contrary, 40 CFR 124.53(e)(3) provides that the State must so indicate and a failure to do so waives the right to certify.

The DEC's confusion in this regard was recently noted by the Court in *Marathon Oil Co. v. E.P.A., supra,* 830 F.2d 1346. In *Marathon Oil,* DEC, oddly enough, certified an individual NPDES permit on a very site-specific basis. *See* 830 F.2d at 1349-53. During the certification process, DEC labored unter (sic) the mistaken impression that it could not relax conditions in an NPDES permit but could only make them more stringent. *See id.* at 1351 & n.26,

1352 & n.35, 1353. Yet, despite this erroneous conception of the certification requirements, DEC still rendered that certification which it claims it may not render here, one which modified the conditions of the permit so that the conditions could not be made any less stringent without violating the requirements of State law. *See id.* at 1352-53.

When EPA promulgated 40 CFR 124.53(e)(3), the Administrator explained the purpose of the provision and that it does indeed mean what it says:

> Some problems have resulted from the practice of certifying draft permits, which practice has arisen from the practical difficulties of certifying applications. In particular, certifications have not always clearly stated exactly what conditions are necessary to comply with State law, and whether less stringent conditions would also satisfy State law. The final regulations remedy these problems by requiring states to set forth in all cases the minimum terms and conditions which will be necessary to comply with applicable law. For example, if a State certifies a permit with an effluent limitation imposing a daily maximum BOD of 25ml/l, it will be required to identify also a ceiling representing the minimum level of control, such as 30mg/l or 40mg/l, which the State finds necessary to comply with State law.

44 Fed.Reg. 32880. EPA recognized the burden this procedure places upon states, but found any alternative to be unacceptable. *Id.*

The result of the State's failure to indicate the extent to which the terms of individual's permits could be relaxed, yet still comply with State law, has been to severely prejudice the rights of the individual permittees.

Absent the required State statements, EPA has no authority to determine whether limitations certified by the State are more stringent than required to meet the requirements of State law. *Roosevelt Campobello*, 684 F.2d at 1056. Thus, when individual miners have attempted to obtain evidentiary hearings on the extent to which their effluent limits could be relaxed as to settleable solids, turbidity, and arsenic, the miners have struck a brick wall. *See In the Matter of: National Pollutant Discharge Elimination System Permit for 415 Alaska Placer Miners, More or Less*, Docket No. 1087-08-03-402C, Regional Administrators Decision on Request for Evidentiary Hearing, Attachment C at 1-2 (1987); *In the Matter of: National Pollutant Discharge Elimination System Permit for 539 Alaska Placer Miners, More or Less*, Docket No. 1085-06-06-14-402C, Regional Administrators Decision on Request for Evidentiary Hearing, Attachment B at 3-4 (January 30, 1987). The Regional Administrator explained:

> Pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, and 40 CFR § 124.53, the Alaska Department of Environmental Conservation certified 0.2ml/l as the effluent limit for settleable solids, 5 NTU's above background for turbidity and 0.05mg/l for total arsenic. 33 U.S.C. § 1341 and 40 CFR § 124.55 require that EPA include as a permit condition any more stringent effluent limit certified by the state as necessary to meet the state's water quality standards . . . Because EPA lacks jurisdiction to review permit limitations and conditions attributable to state certification, the issue of whether a less stringent limit is required is not a proper issue for an evidentiary hearing and the request is denied. *See* 40 CFR § 124.55(e); *In The Matter of*

Homestake Mining Company, NPDES Appeal No. 84-5 (May 19, 1986).

415 Alaska Placer Miners, supra, Attachment C at 1-2.

* * *

CONCLUSION

DEC has been derelict in its duties. Certification is intended to be based on *full* information. Senate Report No. 91-351 at 28. (August 7, 1969) (hereinafter 1969 Senate Report). The DEC, however, complains that it does not have such information, though it has the authority to obtain such information from the permittees, *Id.* at 28-29; 18 AAC 15.130(b), but not by imposing unreasonably burdensome, foreign chores, such as requiring permittees to perform highly scientific tests or gather complex, technical data. *Marathon Oil v. E.P.A.*, 564 F.2d at 1253 & n.56 (9th Cir. 1977); 1969 Senate Report at 28; *see American Petroleum Institute, supra*, 787 F.2d at 984. It is a question of where lies the expertise.

Under the CWA, DEC, as the State's resident expert on environmental matters, has a duty not only to obtain sufficient information so that its certifications are "fully informed," it has the further duty to engage in a continuing process of planning and information gathering. *See* CWA § 303(e), 33 U.S.C. § 1313(e). State law requires much the same. *See* AS 46.03.040. This Court has correspondingly recognized that in environmental matters, "an agency has a continuing duty to gather and evaluate new information" so that the agency is best able to take the requisite "hard look" at those problems which do

arise in the course of administering its area of law. *Alaska Survival, supra,* 723 P.2d at 1287.

To perform its duties, DEC has been granted extensive authority duties. The agency has been empowered to undertake studies, inquiries, surveys, and analyses in order to fulfill its legal obligations. AS 46.03.020(5). To insure that these obligations are met, DEC has authority to enlist the services of numerous public and private agencies, including colleges, universities, institutes, foundations, and other research organizations. *Id.* However, in this case DEC would leave these resources "in the ground," perferring (sic) instead to wave the lazy flag of "impossiblity" or administrative infeasibility, the so-called "short cut" doctrine.

Contentions similar to DEC's were raised by EPA in *Natural Resources Defense Council v. Costle, supra,* 568 F.2d 1369 (*NRDC*). In *NRDC,* EPA filed a Memorandum on "Impossiblity," which raised the spectre of administrative infeasibility if the CWA was not interpreted according to EPA's wishes. 568 F.2d at 1377-78. In the Court's opinion, Circuit Judge Leventhal looked with a skeptical eye on such contentions, especially since EPA, like the State here, made little if any effort to comply but merely proceeded as was most convenient. *Id.* at 1380. Administration under the CWA is not intended to be easy; it requires agency effort and creative solutions to difficult problems.

> But this ambitious statute is not hospitable to the concept that the appropriate response to a difficult problem is not to try at all. . . . Imagination conjoined with determination will likely give EPA a capability for practicable administration. If not, the remedy lies with Congress.

NRDC, 568 F.2d at 1380,1383.

The solution to the DEC's administrative problems in this case lies first with the DEC. Working in cooperation with EPA, DEC can certainly do better than its present myopic insistence on the status quo. To make certifications more manageable, MAC would suggest the following:

> (1) *Issue NPDES Permits for a Longer Period*
>
> Pursuant to CWA § 402(b)(1)(B), 33 U.S.C. § 1342(b)(1)(B), and 40 CFR 122.46(a), NPDES permits may be issued for five years instead of the two or three years in this case.
>
> (2) *Stagger the Issuance of the Permits*
>
> In the present case, the permits were issued so that all expired at once. [I]f the permits were issued for five years and staggered, the State would never have to review more than 20 percent of the permits in a given year, as opposed to the "all at once" approach in this case.
>
> (3) *Incorporate By Reference*
>
> Once the State has properly certified a permit, subsequent certifications of that permit could incorporate previous findings by reference. New information would be needed only to the extent that there were changes or proposed changes in the activity.

Administrative fears concerning inroads upon agency habit are rarely borne out in reality. *See Baker v. City of Fairbanks, supra,* 471 P.2d at 402. If the DEC puts its administrative ingenuity, its imagination and determination to the task, a workable solution will undoubtedly be found. Should a solution not be forthcoming, the agency's redress lies not with this Court but with Congress and/or the State Legislature. *See NRDC,* 568 F.2d at 1383; *Marathon Oil, supra,* 564 F.2d at 1273, and 830 F.2d; *cf. Board of*

Governors, supra, ___ U.S. at ___ n.7, 106 S.Ct. at 689 n.7, 88 L.Ed.2d at 703 n.7.

WHEREFORE, MAC respectfully prays that the court reverse the decisions of the Superior Court and the Deciding Officer, hold that the State of Alaska waived its right to certify 1985 NPDES placer mining permits, hold that the .2ml/l settleable solids effluent is otherwise null and void as being both an improperly promulgated "regulation" and an arbitrarily and otherwise illegally inserted permit term, hold that the 5 NTU turbidity effluent is null and void as an overly stringent and otherwise impermissible effluent limit, and further that the Court hold that the original .7/1.5ml/l settleable solids effluent shall remain the enforceable figure until such time as the DEC obtains the requisite information and properly certifies future NPDES permits on a permit-by-permit, site-specific basis.

DATED this 3rd day of March, 1988, at Fairbanks, Alaska.

LAW OFFICES OF WILLIAM R. SATTERBERG, JR.

/s/ William R. Satterberg, Jr.
William R. Satterberg, Jr.

APPENDIX N

PLACER MINING HEARING

Day One – 2/3/86

MARK ASHBURN
Deciding Officer

APPEARANCES:

Trustees for Alaska	Eric Smith
Miner's Advocacy Council	William Satterberg
Miner's Representative	Ann Rhian
State Department of Environmental Conservation	John McDonaugh

* * *

HEARING OFFICER: . . . And so I guess what I'd ask you to address is this notion that if you establish that predicate, that it's not necessary to meet water quality standards, do your clients still, are your clients still in jeopardy such that you would –um– advise them not to testify, I, I, my inclination is to go forward at the hearing because I don't see what, I don't see the problem as going away for a number of years, and if we are going to have the hearing, I think we should have it, if in April the problem will, for practical purposes, probably be –um–, probably not be there –um– it seems to me your client still would face a difficult –uh– choice, that if they are, were going to testify and offer evidence that would essentially make the EPA's case, that that would be something that would be as, as much a jeopardy then as now.

APPENDIX O

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The United States Constitution, Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*

The United States Constitution, Amendment XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

33 U.S.C. § 1311(b)(1)(C) provides:

Effluent limitations

* * *

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved –

(1) * * *

(C) Not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C. § 1341 provides:

Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the

applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of

the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator,

notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon

notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 8, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the

person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal Licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys

received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1342(a)-(c) provides:

National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such

conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable

waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described

program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such

works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any

revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. –

A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of –

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

40 C.F.R. § 121.2(a)(2)-(3) provides:

Contents of certification.

(a) A certification made by a certifying agency shall include the following:

* * *

(2) A statement that the certifying agency has either (i) examined the application made by the applicant to the licensing or permitting agency (specifically identifying the number or code affixed to such application) and bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations, or (ii) examined other information furnished by the applicant sufficient to permit the certifying agency to make the statement described in paragraph (a)(3) of this section;

(3) A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.

40 C.F.R. § 122.62 provides in relevant part:

Modification or revocation and reissuance of permits

* * *

When the Director receives any information (for example, inspects the facility, receives information submitted by the permittee as required in the permit (see § 122.41), receives a request for modification or revocation and reissuance under § 124.5, or conducts a review of the permit file) he or she may determine whether or not one or more of the causes listed in paragraphs (a) and (b)

of this section for modification or revocation and reissuance or both exist. If cause exists, the Director may modify or revoke and reissue the permit accordingly, subject to the limitations of paragraph (c) of this section, and may request an updated application if necessary. *When a permit is modified, only the conditions subject to modification are reopened.* If a permit is revoked and reissued, the entire permit is reopened and subject to revision and the permit is reissued for a new term. See § 124.5(c)(2). If cause does not exist under this section or § 122.63, the Director shall not modify or revoke and reissue the permit. If a permit modification satisfies the criteria in § 122.63 for "minor modifications" the permit may be modified without a draft permit or public review. Otherwise, a draft permit must be prepared and other procedures in Part 124 (or procedures of an approved State program) followed.

40 C.F.R. § 124.53 provides:

State certification.

(a) Under CWA section 401(a)(1), EPA may not issue a permit until a certification is granted or waived in accordance with that section by the State in which the discharge originated or will originate.

(b) Applications received without a State certification shall be forwarded by the Regional Administrator to the certifying State Agency with a request that certification be granted or denied.

(c) If State certification has not been received by the time the draft permit is prepared, the Regional Administrator shall send the certifying State agency;

(1) A copy of a draft permit;

(2) A statement that EPA cannot issue or deny the permit until the certifying State agency has granted or denied certification under § 124.55, or waived its right to certify; and

(3) A statement that the State will be deemed to have waived its right to certify unless that right is exercised within a specified reasonable time not to exceed 60 days from the date the draft permit is mailed to the certifying State agency unless the Regional Administrator finds that unusual circumstances require a longer time.

(d) State certification shall be granted or denied within the reasonable time specified under paragraph (c)(3) of this section. The State shall send a notice of its action, including a copy of any certification, to the applicant and the Regional Administrator.

(e) State certification shall be in writing and shall include:

(1) Conditions which are necessary to assure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law;

(2) When the State certifies a draft permit instead of a permit application, any conditions more stringent than those in the draft permit which the State finds necessary to meet the requirements listed in paragraph (e)(1) of this section. For each more stringent condition, the certifying State agency shall cite the CWA or State law references upon which that condition is based. Failure to provide

such a citation waives the right to certify with respect to that condition; and

(3) A statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards. Failure to provide this statement for any condition waives the right to certify or object to any less stringent condition which may be established during the EPA permit issuance process.

40 C.F.R. § 124.55(b) provides:

Effect of State certification.

* * *

(b) If there is a change in the State law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate State board or agency stays, vacates, or remands a certification, a State which has issued a certification under § 124.53 may issue a modified certification or notice of waiver and forward it to EPA. If the modified certification is received before final agency action on the permit, the permit shall be consistent with the more stringent conditions which are based upon State law identified in such certification. If the certification or notice of waiver is received after final agency action on the permit, the Regional Administrator may modify the permit on request of the permittee only to the extent necessary to delete any conditions based on a condition in a certification invalidated by a court of competent jurisdiction or by an appropriate State board or agency.